
NAVAL LAW REVIEW

ARTICLES

A PRIMER ON THE EMPLOYMENT OF NON-LETHAL WEAPONS

Lieutenant Colonel James C. Duncan, USMC

LEGAL ASPECTS OF INFORMATION WARFARE: Military Disruption of Telecommunications

Commander Roger D. Scott, JAGC, USN

THE COASTAL FISHING VESSEL EXEMPTION FROM CAPTURE AND TARGETING: An Example and Analysis of the Origin and Evolution of Customary International Law

Major Ronald S. McClain, USMC

RULES OF ENGAGEMENT AND THE CONCEPT OF UNIT SELF DEFENSE

Lieutenant Commander Dale Stephens, Royal Australian Navy

LIFE AND HUMAN DIGNITY, THE BIRTHRIGHT OF ALL HUMAN BEINGS

Lieutenant Commander Catherine Sue Knowles, JAGC, USN

RETHINKING INTERNATIONAL SELF-DEFENSE: The United Nations' Emerging Role

Commander Byard Q. Clemmons, JAGC, USN and Major Gary D. Brown, USA



VOL. 45



1998

DISTRIBUTION STATEMENT A

Approved for public release;
Distribution Unlimited

NAVAL LAW REVIEW

Judge Advocate General of the Navy
Rear Admiral John D. Hutson, JAGC, USN

Commanding Officer, Naval Justice School
Captain Timothy C. Young, JAGC, USN

Editor
Lieutenant Commander Kevin M. Brew, JAGC, USN

Associate Editor
Lieutenant Commander James R. Crisfield Jr., JAGC, USN

Managing Editor
Captain Robert M. Fuhrer, USMC

Editorial Board
Lieutenant Commander Jennifer S. Herold, JAGC, USN
Lieutenant Commander Robert B. Blazewick, JAGC, USN
Major Louis J. Puleo, USMC
Lieutenant Commander Michael E. Tousley, USCG
Lieutenant Commander Tamara A. Miro, JAGC, USN
Lieutenant Commander Steven M. Barney, JAGC, USN
Lieutenant Commander Barry R. Blankfield, JAGC, USN
Lieutenant Commander Paul C. Kiamos, JAGC, USN
Lieutenant Don A. Martin, JAGC, USN
Captain Kevin J. Conway, USMC

Published by the Naval Justice School, the Naval Law Review encourages frank discussion of relevant legislative, administrative, and judicial developments in military and related fields of law.

Views expressed in published articles must be considered solely those of individual authors and do not purport to voice the views of the Naval Justice School, the Judge Advocate General, the Department of the Navy, or any other Agency or Department of the United States.

The Naval Law Review is published from appropriated funds by authority of the Judge Advocate General in accordance with Navy Publications and Printing Regulations P-35.

This issue of the Naval Law Review may be cited as 45 Naval L. Rev. [page number] (1998).

SUBSCRIPTIONS

Subscription information may be obtained by writing to the Managing Editor, *Naval Law Review*, Naval Justice School, 360 Elliot Street, Newport, RI 02841-1523. Publication exchange subscriptions are available to organizations which publish legal periodicals.

INDIVIDUAL PURCHASES

Individual copies of the *Naval Law Review*, formerly titled the *JAG Journal*, may be purchased by contacting the Defense Technical Information Center (DTIC) and the National Technical Information Service (NTIS) for republication and sale. Copies are not available from the Naval Justice School.

Commands not already registered with the DTIC may obtain registration forms and information on ordering publications by writing to:

Defense Technical Information Center
Attention: Code DTIC-FDRA
Cameron Station, Building 5
Alexandria, VA 22304-6145

COMM (703) 767-8273
DSN 427-8273
1-800-CAL-DTIC (225-3842)

Individual purchasers may obtain information on ordering publications by writing to:

U.S. Department of Commerce
National Technical Information Service
5285 Port Royal Road
Springfield, VA 22161

An alternative means of obtaining the *Naval Law Review* is by downloading it from the Naval Justice School Web Page at www.njs.jag.navy.mil.

CONTENTS

Articles

A Primer on the Employment of Non-Lethal Weapons.....	1
<i>Lieutenant Colonel James C. Duncan, USMC</i>	
<i>Legal Aspects of Information Warfare: Military Disruption of</i> Telecommunications	57
<i>Commander Roger D. Scott, JAGC, U.S. NAVY</i>	
<i>The Coastal Fishing Vessel Exemption from Capture and Targeting: An Example and</i> Analysis of the Origin and Evolution of Customary International Law	77
<i>Major Ronald S. McClain, USMC</i>	
Rules of Engagement and the Concept of Unit Self Defense.....	126
<i>Lieutenant Commander Dale Stephens, Royal Australian Navy</i>	
Life and Human Dignity, The Birthright of all Human Beings	152
<i>Lieutenant Commander Catherine Sue Knowles, JAGC, USN</i>	
Rethinking International Self-Defense: The United Nations Emerging Role.....	217
<i>Commander Byard Q. Clemmons & Major Gary D. Brown</i>	
International Law Regarding Pro-Democratic Intervention: A Study of the Dominican Republic and Haiti.....	247
<i>Major D. J. Lecce, USMC</i>	
The Defense Institute for International Legal Studies.....	263
<i>Mr. Walter W. Monroe</i>	
"Neither Confirm nor Deny" At Sea Still Alive and Consistent with International Law	268
<i>James R. Van de Velde</i>	
Remarks of Mr. Vladimir V. Grachev	273

Book Reviews

Brent G. Filbert, <i>Naval Law: Justice and Procedure in the Sea Services</i>	282
Beyond the Law of the Sea	285
<i>George V. Galdorisi and Kevin R. Vienna</i>	

A PRIMER ON THE EMPLOYMENT OF NON-LETHAL WEAPONS

Lieutenant Colonel James C. Duncan¹

I. Introduction

During Operation United Shield,² U.S. forces under the command of Lieutenant General (now General) A. C. Zinni, U.S. Marine Corps, pioneered the use of a new class of weapon systems that have become known as non-

¹ Lieutenant Colonel, United States Marine Corps. Currently, the Assistant Director for Amphibious Operations, Oceans Law and Policy Department in the Center for Naval Warfare Studies at the Naval War College, Newport, Rhode Island. B.S., 1977 University of Tennessee at Martin; J.D., 1981 University of Tennessee at Knoxville; LL.M., 1989, George Washington University. Prior to assignment to the Naval War College, he served in back-to-back tours as the Deputy Staff Judge Advocate for U.S. Marine Corps Forces, Atlantic II Marine Expeditionary Force and for III Marine Expeditionary Force/3d Marine Division.

² A chronological summary of the events leading to Operation United Shield follows. The failure of the United Nations Operation in Somalia (UNOSOM I) to alleviate the widespread famine and disease, the devastating clan warfare and the tremendous loss of life led President George Bush in the Autumn of 1992 to call for more involvement by the United States and the international community. An international effort was thereafter undertaken to restore order and to deliver humanitarian aid to the people of Somalia under Operation Restore Hope. The commander for the U.S.-led Unified Task Force (UNITAF) was Lieutenant General Robert Johnston, U.S. Marine Corps. By the Spring of 1993, activities in Somalia began to return to normal. The widespread famine and disease once prevalent were under control and the fighting between the clans had all but stopped. Somalia was again at peace, and the time seemed right to transfer control of the operation to the United Nations. In May 1993, command and control of Operation Restore Hope was turned over to the United Nations in what became known as United Nations Operation Somalia II (UNOSOM II). The United Nations leadership decided to embark on a much more ambitious nation-building and disarmament policy for Somalia. This new policy created increased turmoil among the warring clans and factions in Somalia. The end result was the death of over 130 peacekeepers, and the judgment by many in the international community that the United Nations mission in Somalia had failed. In light of these events, the United Nations ordered the withdrawal of all peacekeepers from Somalia by March 1995. The United Nations requested the United States provide security for the peacekeepers during the withdrawal. During January 1995, the U.S. Central Command tasked I Marine Expeditionary Force (MEF), under the command of Lieutenant General (now General) Zinni, to conduct this operation (this was the same command that had been involved in Operation Restore Hope in 1993 under Lieutenant General Johnston). Operation United Shield began in February 1995. Colonel Frederick M. Lorenz, U.S. Marine Corps, *"Less-Lethal" Force in Operation United Shield*, Marine Corps Gazette, September 1995 at 69-70; Lieutenant Colonel Leslie L. Ratliff, U.S. Army, Joint Task Force Somalia, A Case Study 1-6 (March 14, 1996) (unpublished manuscript on file at the library of the Naval War College, Newport, Rhode Island) and F. M. Lorenz, *Non-Lethal Force: The Slippery Slope to War?*, Parameters, Autumn 1996 at 52-53. See also Lieutenant Colonel Roger D. Kirkpatrick, U.S. Marine Corps, Humanitarian Expeditions to Somalia 1-27 (April 25, 1994) (unpublished manuscript on file at the library of the Naval War College, Newport, Rhode Island) and Lieutenant Colonel George P. Fenton, U.S. Marine Corps, -- Marine Expeditionary Units (Special Operations Capable) -- at the Operational Level in Military Operations Other Than War 1-17 (June 16, 1994) (unpublished manuscript on file at the library of the Naval War College, Newport, Rhode Island).

lethal weapons. General Zinni's decision to equip the Marines of I Marine Expeditionary Force (MEF) with non-lethal weapons was revolutionary. Without question, his decision has had a tremendous impact on all U.S. military forces by providing the stimulus to change the perception of non-lethal weapons. In addition, Operation United Shield prepared the groundwork for the development of a new concept for the employment of non-lethal weapons and moved the U.S. military toward a new age of warfare.

Some critics may argue since the U.S. military used weapon systems or technology that could be characterized as non-lethal (for example, riot control agents,³ defoliants,⁴ and carbon fibers against electrical power grids⁵) prior to Operation United Shield, that the use of non-lethal weapons by the U.S. military was not new.⁶ In fact, long before Operation United Shield, technological advances that could be characterized as non-lethal opened the door to new weapon systems with capabilities only dreamed of in the past. At the time of Operation United Shield, several different types of technology that could be characterized as non-lethal existed or were being developed through

³ On April 8, 1975, President Gerald Ford issued Executive Order 11,850 which addresses the use of riot control agents by the U.S. armed forces. Under Executive Order 11,850, the United States renounced the use of riot control agents in time of war without authorization from the national command authorities. Exec. Order No. 11,850, 40 Fed. Reg. 16187, 3A C.F.R. 149-150 (1975).

⁴ *Id.* Executive Order 11,850 also discusses the use of herbicides by the U.S. armed forces. There are two uses expressly permitted under this order without authorization from the national command authorities. Those two uses are: (1) control of vegetation around and within the immediate defensive perimeter of a U.S. military installation or base and (2) domestic use. For a discussion of the U.S. military's use of defoliants in Vietnam see *Herbicides in War: The Long-term Ecological and Human Consequences* (Arthur H. Westing ed., 1984); Thomas Whiteside, *The Withering Rain: America's Herbicidal Folly* (1971); and *A Technology Assessment of the Vietnam Defoliant Matter, A Case History, Report to the Subcommittee on Science, Research, and Development of the Committee on Science and Astronautics, U.S. House of Representatives*, 91st Cong. 1st Sess. (August 8, 1969).

⁵ One of the non-lethal "smart weapons" used during the Gulf War was a special warhead adapted for the Tomahawk Cruise missile that dispersed thousands of carbon fibers after exploding over an electrical power station target. After the carbon fibers drifted down and settled, they would cause the power station to short circuit. By using this type of non-lethal weapon, the United States was able to neutralize several of the Iraqi electrical power stations without permanent damage. Nick Lewer, *Non-Lethal Weapons -- A New Dimension*, *Bulletin of Arms Control*, September 1996 at 1; David A. Fulgham, *Secret Carbon-Fiber Warheads Blinded Iraqi Air Defenses*, *Aviation Week & Space Technology*, April 27, 1992 at 18-20. See also, 60 Minutes: *Shoot not to Kill* (CBS television broadcast, L. Franklin Devine, May 1996).

⁶ The impetus to exploit non-lethal technology did not arise until the post cold-war era and the shift of the United States' national focus from conventional war to peacekeeping operations, humanitarian operations and regional conflicts. However, non-lethal technology had been available for decades as evidenced by Central Intelligence Agency (CIA) documents from the 1960s that discuss weapon systems which could be characterized as employing non-lethal technology. Steven Aftergood, *The Soft-Kill Fallacy*, *The Bulletin of the Atomic Scientists* (September/October 1994) at 40. Also, the U.S. National Science Foundation Report on Non-Lethal Weapons of 1972 contained a list of 34 different weapon systems that could be characterized as non-lethal. J. Wright, *Shoot Not to Kill*, *The Guardian* (May 19, 1994). See also National Security Program Policy Analysis Paper No. 94-01, *Nonlethal Military Means: New Leverage For A New Era* (1994), Colonel John L. Barry, U.S. Air Force, ET AL., at 9.

civilian or military research projects. But certainly, the main factor triggering the current non-lethal weapons revolution was indeed what General Zinni and his staff did to prepare for Operation United Shield. During the predeployment phase of this operation, General Zinni's staff examined the existing weapon systems that could be characterized as non-lethal (from both civilian and military sources) and applied the best of them to create a workable solution to the expected problem of controlling unarmed Somali civilians, while providing adequate protection to the United Nations forces who were withdrawing from Somalia.⁷ As part of the strategy for the employment of non-lethal weapons for this operation, General Zinni intentionally publicized the use of these weapon systems. This psychological ploy intimidated potential Somali adversaries and gave the U.S. military a positive public image at home and abroad. It was the preparation for implementation and the formation of a basic concept for the employment of non-lethal weapons that makes General Zinni's actions during Operation United Shield so significant. For not until Operation United Shield, did the U.S. military actively seek, acquire, train with, and deploy non-lethal weapon systems for use for mission accomplishment on the battlefield. In a nutshell, the special emphasis placed on non-lethal weapon systems has led to a reconceptualization of the art of war and diplomacy while at the same time bringing into focus the true meaning of Sun Tzu's statement, "[t]o win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill."⁸

Like every new concept in warfare, the non-lethal weapons concept is undergoing developmental pains as it moves from a novelty to the norm. Commanders trying to understand the concept face an uphill battle as they struggle to cut through the misinformation, the confusion and the strategic questions about the utility of non-lethal weapons. Since this class of weapons has become another arrow in the commander's quiver, each commander is confronted with the following questions. How do I select the appropriate non-lethal weapons for my mission? How do I train my personnel in their use, and how do I employ them on the modern battlefield? The goal of this paper is to help the commander work through the non-lethal weapons morass and answer these questions.

II. General Discussion of Non-Lethal Weapon Systems

Most conflicts pose a fear of escalation. The use of non-lethal weapon systems in the early stages of a conflict may reduce the risk of escalation, and give diplomacy a chance to work. Unlike the traditional military capabilities

⁷ Colonel Lorenz, *supra* note 2, at 70. As stated by Assistant Secretary of Defense, H. Allen Holmes, "[t]he operation in Somalia was the first contingency where U.S. troops employed non-lethal weaponry against hostile forces." *Warfighters Want Weapons That Disable But Don't Kill*, National Defense, July/August 1996 at 24.

⁸ SUN TZU, *THE ART OF WAR* 77 (Samuel B. Griffith trans., Oxford Press 1969). Although Sun Tzu wrote these words almost twenty-four hundred years ago, they still ring true today. Military commanders who desire to show their skill and leadership must take advantage of non-lethal technology to help forge a new military strategy for the next millennium.

associated with lethal weapon systems, the mission context for the employment of non-lethal capabilities is not always obvious. Arguably, non-lethal weapon systems have a potentially broader range of application than do lethal systems. At present, however, non-lethal weapons have not gained widespread acceptance as useful additions to the weapons inventory.⁹ For the U.S. military, this must change because failure to properly consider the non-lethal technologies available may reduce the ability of commanders to accomplish their assigned mission, while simultaneously increasing the possibility of collateral damage to civilian property, incidental injury or death to civilians and other adverse effects from the military action taken. As the number and type of non-lethal technologies increase, the U.S. military must adopt procedures and policies that permit their smooth and efficient integration into warfighting and peacekeeping tactics and doctrine. This integration will require a fresh viewpoint and a willingness to embrace non-lethal technology with an open mind. Embracing non-lethal technology will require the military services and military commanders to think "outside the box." The military services must restructure combat units and develop tactics, techniques and procedures for the use of non-lethal weapon systems.¹⁰ Likewise, military commanders must be prepared to reorganize their individual units for the efficient use of a selected non-lethal weapon, to design specific unit level training for each system, to establish safety standards and maintenance support for them, and to develop appropriate rules of engagement for their employment.

Utilization of non-lethal weapon systems in today's joint and combined military climate is very apropos.¹¹ It also reflects a predictable and logical interest in non-lethal technology by U.S. policymakers and strategists. In light of this growing interest, future commanders will discover that a vital part of putting together the right force for the mission will include the selection of both lethal and non-lethal weapon systems.¹²

⁹ Generally, commanders will employ only those weapon systems they feel comfortable using. For most commanders, the comfort level for lethal weapon systems is much higher than the comfort level for non-lethal weapons. Raising the comfort level of commanders for non-lethal systems will require a concerted effort by the military services through the implementation of improved training and instruction with respect to their capability and versatility. The Commander in Chief (CINC), United States Special Operations Command and the Secretaries of the Military Departments are responsible for the training of military personnel concerning non-lethal weapons. U.S. DEP'T OF DEFENSE, DIR. 3000.3, POLICY FOR NON-LETHAL WEAPONS (9 Jul, 1996). For further discussion on training issues see pages 26-30.

¹⁰ In this endeavor the military services should heed the advice of General Charles C. Krulak, Commandant, U.S. Marine Corps, and lean on private industry and other "national assets" to help in the development of these new tactics and strategies. *The Next Millennium*, Navy Times, January 5, 1998 at 34.

¹¹ United States allies in the North Atlantic Treaty Organization (NATO) have recognized that non-lethal weapon systems will play a major role in future warfare. Currently, NATO has assembled a panel of experts to decide what types of non-lethal technologies the alliance should accept and use in future peacekeeping operations and traditional military operations. Brooks Tigner, *NATO Panel To Steer Nonlethal Weapon Use*, Army Times, October 13, 1997 at 37.

A. The Term "Non-Lethal"

The first step in understanding non-lethal weapons is to examine the term "non-lethal." Initially, many different terms were used to try to capture the essence of this new class of weapon systems.¹³ Defining non-lethal weapons has been very difficult not only because diverse perspectives developed over their potential utilization, but also, because of the erroneous expectations of those hearing the words "non-lethal weapons" that no harm or serious injury will come to those against whom such weapons are employed.¹⁴ The term "non-lethal" refers to the ultimate goal which is to avoid fatalities and the unnecessary destruction of property. All U.S. military commanders since the Vietnam era realize the importance of maintaining public support and confidence for any military operation or campaign. The key to maintaining this public support and confidence when the operation plan calls for the use of non-lethal weapon systems is to provide information to the public about the dangers involved when these weapon systems are used. The public should be made aware that the use of a non-lethal weapon always raises the possibility of serious injury, death or destruction of property. For this reason, many see the term "non-lethal" "as both a euphemism and an oxymoron when applied to weapons."¹⁵ Supporters of the term "non-lethal" acknowledge this apparent ambiguity, while pointing out that the term "non-lethal" more accurately represents the intent of the user which is "neither to kill nor to harm

¹² The joint task force commander must build/organize the force so that it has all the capabilities required to complete the expressed and implied tasks of the mission.

¹³ Some of the terms that have been used to describe non-lethal weapons are as follows: non-injurious, disabling measures, system disabling, immobilizers, discriminate force, less-lethal, less-than-lethal, minimum force, strategic immobilizers, mission kill, new age weapons, soft kill, stabilizing technology, denial of services concepts, limited effects technology, neutralizing technology, reduced lethality weapon, low collateral damage, weapons which do not cross the death barrier, and pre-lethal. For a discussion of some of these terms see Nick Lewer and Steven Schofield, *Non-Lethal Weapons: A Fatal Attraction* 5-6 (1997); Nick Lewer, *Non-Lethal Weapons -- A New Dimension*, Bulletin of Arms Control, September 1996 at 1; Nick Lewer, *Non-Lethal Weapons*, Medicine and War 78 (1995); *Disabling Technologies: A Critical Assessment*, International Defense Review 33 (1994); *Operations Other Than War: The Technological Dimension* 44-45, Institute For National Strategic Studies, National Defense University (1995); and Lieutenant Colonel Alan W. Debban, U.S. Air Force, *Disabling Systems: War Fighting Option for the Future*, Airpower Journal 45 (Spring 1993). Even within the military services there has been considerable debate over what terminology should be used. The U.S. Army and the U.S. Air Force favored use of the term "non-lethal" weapons, while the U.S. Marine Corps and the U.S. Navy favored use of the term "less lethal." For a brief discussion of the rationale behind the U.S. Marine Corps' support of the term "less lethal" and the U.S. Army's adoption of the term "non-lethal" see Lexi R. Alexander and Julia L. Klare, *Nonlethal Weapons: New Tools for Peace*, Issues in Science and Technology, Winter 1995-1996 at 69. See also Colonel Lorenz, *supra* note 2, at 70. After much debate, the term that gained favor within the Department of Defense was "non-lethal."

¹⁴ Non-lethal weapons can be fatal. For example, pepper spray has proven fatal in several cases; microwaves can disable pacemakers; acoustic weapons have killed humans; and dazzling lasers which were used against Argentinean pilots to cause temporary blindness in the Falklands War resulted in three plane crashes. Barry ET AL., *supra* note 6, at 13.

¹⁵ Lewer and Schofield *supra* note 13, at 5. See also Barry ET AL., *supra* note 6, at 5.

permanently.”¹⁶ Arguably, any term selected to represent this class of weapon systems would face the same perception problems that the term “non-lethal” faces.

B. Definition of Non-Lethal Weapons

Non-lethal weapon systems include those systems designed to help achieve political and military objectives by providing a means to leverage or compel a change in an opponent’s behavior while at the same time precluding the need to intervene with overwhelming lethal force. Almost every definition of non-lethal weapons focuses on two areas. The first is the physical capability of these weapons not to permanently injure, kill or destroy property, and the second is their potential application to traditional military operations (spanning the entire spectrum of conflict) and to “diplomatic matters”¹⁷ of concern. By comparing the various definitions for non-lethal weapons, one will notice that most include one or more of the following elements: (1) weapon systems designed to deter or neutralize the belligerent; (2) weapon systems not designed to kill, cause permanent harm or incidental injury; (3) weapons systems whose impact is intended to be temporary in nature or reversible; and (4) weapon systems designed to cause minimum collateral damage to property and the environment. Within the U.S. military, the term non-lethal has been adopted as the official term for this general class of weapon systems. Non-lethal weapons are defined by the Department of Defense as: “[w]eapons that are explicitly designed and primarily employed so as to incapacitate personnel or material, while minimizing fatalities, permanent injury to personnel and undesired damage to property and the environment.”¹⁸ The key factor to note from the Department of Defense definition is that non-lethal weapons are not required to have a zero probability of producing permanent injuries or fatalities. Unlike lethal weapon systems which achieve success through the physical destruction of targets in order to neutralize them, non-lethal weapon systems accomplish the same goal by significantly reducing permanent injuries, fatalities and property damage.

¹⁶ Lewer and Schofield *supra* note 13, at 6.

¹⁷ The term “diplomatic matters” might more appropriately be viewed as “coercive diplomacy.” In essence, non-lethal weapons broaden the foreign policy options available to the United States. Donald Daniels, Bradd Hayes and Chantal de Jonge Oudraat have conceptualized a new type of United Nations operation known as “coercive inducement” which is distinct from the traditional United Nations missions of peacekeeping and peace enforcement. Memorandum from Donald C. Daniel ET AL., Strategic Research Department, Center for Naval Warfare Studies, U.S. Naval War College, Research Report No. 9-97, Subject: *Talons of the Dove: Coercive Inducement and the Containment of Crisis*, at 17. As conceptualized, the “coercive inducement” operation would be an excellent example of “coercive diplomacy” and would provide an outstanding opportunity for the employment of non-lethal weapons.

¹⁸ DoD Dir. 3003, *supra* note 9, at 1. For other definitions of the term “non-lethal weapons” *see* Lewer and Schofield *supra* note 13, at 6-7.

C. Relationship to Information Warfare

Information warfare¹⁹ is a very hot topic within the Department of Defense. However, "coming to grips with information warfare is like the effort of the blind men to discover the nature of the elephant."²⁰ Today, knowledgeable planners talk about seven different forms of information warfare.²¹ Those seven forms are: electronic warfare,²² command and control warfare,²³ psychological warfare, intelligence-based warfare, economic

¹⁹ Some of the major goals of information warfare are to use non-lethal technology and lethal weapon systems to deny, destroy, neutralize, or disable the communication and targeting capabilities of an enemy. Information warfare has been defined in a Chairman, Joint Chief of Staff Instruction as: "[a]ctions taken to achieve information superiority by affecting adversary information, information-based processes, information systems, and computer-based networks while defending one's own information, information-based processes, information systems, and computer-based networks." CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 3210.10, JOINT INFORMATION WARFARE POLICY, 6 (2 Jan 1993). In similar fashion, the Department of Defense defines information warfare as: "[i]nformation operations conducted during time of crisis or conflict to achieve or promote specific objectives over a specific adversary." U.S. DEP'T OF DEFENSE Dir.S-3600.1. INFORMATION WARFARE, 1-1 (1996). The Department of Defense defines information operations as: "[a]ctions taken to affect adversary information and information systems while defending one's own information and information systems." *Id.* Martin C. Libicki envisions information as a realm where conflict may occur as in the air, sea and land, and he discusses who should wage an information war. During this discussion, Libicki acknowledges the notion that information warfare may be viewed as non-lethal strategic warfare. Martin C. Libicki, *The Mesh and the Net, Speculations on Armed Conflict in a Time of Free Silicon* 80-81, Center for Advanced Concepts and Technology, Institute for National Strategic Studies, National Defense University (August 1995).

²⁰ Martin C. Libicki, *What Is Information Warfare?* 3, Center for Advanced Concepts and Technology Institute for National Strategic Studies, National Defense University (August 1995).

²¹ *Id.* at 7.

²² "Electronic Warfare (EW) is any military action involving the use of electromagnetic and directed energy to control the electromagnetic spectrum or to attack the enemy. The three major subdivisions of Electronic Warfare are Electronic Attack (EA), Electronic Protection (EP) and Electronic Warfare Support (ES)." CHAIRMAN, JOINT CHIEFS OF STAFF MEMORANDUM OF POLICY NO. 6, ELECTRONIC WARFARE, 1 (1993). Electronic warfare, sometimes referred to as electronic combat, continues to grow with each new advancement in technology. When properly integrated into military operations, it can enhance combat power. As with information warfare, there is a need for both offensive and defensive electronic warfare capability. In addition, there is a fear that another nation or unfriendly special interest group could outbuild the United States. Colonel Richard A. Rash, U.S. Air Force, *Electronic Combat -- Making the Other Guy Die For His Country* 25 (Air War College Research Report 1983). See also W. L. Colton ET AL., *Overview of Electronic Warfare: A Survey of Trends, Systems and Effects* (Defense Technical Information Center 1987).

²³ Since command and control warfare implements information warfare, command and control warfare may be viewed as a subset of information warfare. CHAIRMAN, JOINT CHIEFS OF STAFF MEMORANDUM OF POLICY NO. 30, COMMAND AND CONTROL WARFARE, 3 (1993). Command and control warfare has been defined as: "[t]he integrated use of operations security (OPSEC), military deception, psychological operations (PSYOP), electronic warfare (EW), and physical destruction, mutually supported by intelligence, to deny information to, influence, degrade or destroy adversary [command and control (C2)] capabilities, while protecting friendly C2 capabilities against such actions." *Id.* at 2.

information warfare, hacker warfare, and cyberwarfare. Of the seven forms of information warfare Martin C. Libicki states that the threat of economic information warfare, hacker warfare, and cyberwarfare is grossly exaggerated.²⁴

The relationship of information warfare to non-lethal technology is at once complex and confusing. Part of this confusion stems from the fact that the scope of non-lethal technology is so broad that some experts categorize information warfare as a subset of non-lethal technology.²⁵ Falling outside the non-lethal weapons umbrella would be those weapon systems used for information warfare that do not minimize fatalities, permanent injury to personnel and undesired environmental or property damage. Although one might argue information warfare is a subset of non-lethal technology, in reality this is not entirely accurate since both lethal and non-lethal weapons systems are used for information warfare.

During the Persian Gulf War, the U.S. military quickly recognized the importance not only of information operations but of controlling the electromagnetic spectrum. After this conflict, information warfare was established as a distinct area supported by a multiple organizations with their own funding for specific information warfare missions.²⁶ However, it was not until 1996 with the development of an official Department of Defense non-lethal weapons policy that an office was established and funded for the research and the development of non-lethal weapons.²⁷ By looking at the timing of the establishment of the new non-lethal technology structure and the information warfare structure, one might conclude that the U.S. military had placed the cart before the horse.²⁸ As the new military structure for non-lethal weapons continues to develop and expand, a turf battle over control of the research and development of non-lethal technologies between the non-lethal technology structure and the structures established for the seven forms of information warfare is likely to occur.

²⁴ Libicki, *supra* note 20, at 97. See also Martin C. Libicki, *Defending Cyberspace and Other Metaphors*, Center for Advanced Concepts and Technology Institute for National Strategic Studies, National Defense University (February 1997).

²⁵ Chris Morris ET AL., *Weapons of Mass Protection: Nonlethality, Information Warfare, and Airpower in the Age of Chaos*, *Airpower Journal* 25 (Spring 1995). See also Xavier K. Maruyama, *Technologies in Support of International Peace Operations: Military Technologies for Ground Forces* (Draft) 42-44 (unpublished manuscript on file with the author).

²⁶ Morris ET AL., *supra* note 25, at 25. See also Benjamin F. Crew, *Information Warfare, Organizing for Action*, 1-2 (May 20, 1996) (unpublished manuscript on file at the library of the Naval War College, Newport, Rhode Island).

²⁷ The establishment of the Department of Defense non-lethal weapons policy in DoD Dir. 3000.3 (July 9, 1996) represented the first major step toward better coordination and cooperation among the military services in the non-lethal technology arena.

²⁸ Burton Stevenson, *THE MACMILLIAN BOOK OF PROVERBS, MAXIMS, AND FAMOUS PHRASES* 290 (1965).

Technology can be both a shield and a sword. Information warfare exploits the enemy's reliance upon technology. Since reliance by the U.S. military upon technology also provides vulnerabilities and dependencies that can be exploited, there is a need for a robust defensive information warfare capability.²⁹ In both offensive and defensive information warfare, non-lethal weapons are the one class of weapon systems which will allow the U.S. military to maintain its technological edge. As stated by General John M. Shalikashvili, "[i]nformation warfare has emerged as a key joint war fighting mission area. The explosive proliferation of information-based technology significantly impacts warfighting across all phases, the range of military operations, and all levels of war."³⁰ In light of General Shalikashvili's statement, one can also say that non-lethal weapon systems will have a major impact throughout the entire spectrum of military operations and at all levels of conflict.

D. Criticisms of Non-Lethal Weapons

There are numerous criticisms of non-lethal weapons. Some feel their use reflects a lack of political resolve and weakens the effectiveness of the U.S. military by not producing the physical effects necessary to punish an aggressor. Others believe the use of non-lethal weapons encourages politicians to micromanage U.S. military commanders and places the lives of U.S. military personnel at risk. As shown by these statements, many see non-lethal weapons as pawns to politicians who are attracted by the concept that it is possible to apply some force through a relatively benign weapon system to achieve foreign policy objectives.³¹ Politicians envision military commanders with non-lethal weapon systems applying proportional force to those future threat scenarios where the risk of death or permanent injury to civilians would be counter to the purpose of the intervention and might result in future escalation to lethal weapons systems.³² Some feel the development of non-lethal technology will

²⁹A security test of the Defense Department's communication systems revealed serious vulnerabilities to existing software such as SATAN which is available to anyone on the internet. Arnaud de Borchgrave, *Is America At Risk In A Cyberwar*, *Insight on the News*, March 11, 1996 at 48.

³⁰ CHAIRMAN, THE JOINT CHIEFS OF STAFF, *Information Warfare: A Strategy for Peace . . . The Decisive Edge in War*, (n.d.) at 1.

³¹ For example, with the breakup of the former Soviet Union and the disintegration of Russian control over the Eastern Bloc nations, the peacekeeping and peace enforcement challenges facing U.S. political leaders have expanded. Since "traditional U.S. national security interest are no longer seriously threatened, the United States enjoys the luxury of placing its military power in the service of promoting democracy, human rights, humanitarian relief and other American values overseas." Jeffrey Record, *Congress, Information Technology, and the Use of Force* 476-477, *Information Age Anthology: Volume I, Part Three, Government and the Military*, Center for Advanced Concepts and Technology, Institute for National Strategic Studies, National Defense University (David S. Alberts and Daniel S. Papp eds., June 1997). See also Lewer, *Medicine and War*, *supra* note 13, at 88. Operations conducted to establish peace, to promote democracy and to supply humanitarian relief often result in situations where the use of non-lethal weapons may be appropriate.

trigger unwanted and unintended involvement in parts of the world experiencing turmoil.³³ These critics express concern that this will result in the expanded use of U.S. military forces in non-traditional missions thus reducing their warfighting capability and effectiveness. Furthermore, these critics note that it is unrealistic in many instances to believe that the use of non-lethal weapons will limit the escalation of violence. In interventions which begin with an intent to employ only non-lethal weapons, U.S. forces may quickly face the necessity of employing lethal weapons where no actual intervention would have occurred if it were understood that lethal systems would be used. Criticisms of a political nature such as these will always exist, but the negatives represented by these arguments are far outweighed when examined in light of the almost endless realm of possibilities that non-lethal technologies will provide for modern warfare.

Another criticism of non-lethal technology is that it provides a means for U.S. government contractors to lobby for the purchase of new weapon systems and to attempt to preserve influence in the post cold-war world.³⁴ Although there should be concern for improper lobbying, this problem is more than adequately offset by the current budgetary climate requiring reductions in military personnel, structure and funding within the military services. However, implicitly included within this criticism is the possibility of a future non-lethal arms race with another nation. A lethal arms race would be a matter of grave concern, but no undue alarm should arise from the possibility of a non-lethal arms race. First, a non-lethal arms race is highly unlikely. Second, if it were to occur, it would likely be a direct response to specific capabilities developed by the United States, and third, it would probably not be initiated by rogue nations who oppose the United States since their desire would be to develop weapon systems to kill U.S. citizens and to destroy U.S. property rather than preserve life and refrain from property destruction.

There is also a feeling that non-lethal technology will make war more likely because of the perceived reduction of its destructive consequences. This criticism appears to be a reaction to the increasing use of U.S. military force in multiple hot spots around the world. However, a review of the U.S. military operations conducted during the last three years does not show a correlation between the increase in the number of U.S. military operations and the use of a non-lethal weapon capability.

³² The civilian leadership in the United States often walks a political tightrope. On one hand they feel obligated through a sense of moral obligation and internal domestic pressure to intervene to help alleviate suffering, but on the other hand they want to avoid U.S. military and foreign civilian casualties. Alexander and Klare, *supra* note 13, at 68.

³³ *Non-Lethal Technology: Military Options and Implications, Report of an Independent Task Force*, sponsored by the Council on Foreign Relations (Malcolm H. Wiener, Chairman) viii (1995).

³⁴ Lewer, *Medicine and War*, *supra* note 13, at 88.

Another concern is that the effects of non-lethal technology are by definition temporary or reversible. Thus, the commander is required to utilize valuable intelligence assets to maintain surveillance of those enemy forces that have been only temporarily neutralized.³⁵ As the neutralized forces recover from the initial strike, new strikes with either non-lethal or lethal weapons may be required to keep these forces out of the fight. This could lead to an escalation of the conflict. The response to this criticism is that the use of a non-lethal weapon system should be part of a well thought out and executed operation plan. The plan should address exactly how the neutralized forces and equipment of the adversary will be handled when the effect of the non-lethal weapon wears off. In addition, by mixing non-lethal systems which have a surveillance capability with others which have a neutralizing capability, the command's intelligence gathering function may be greatly improved. This would permit a commander to satisfy his intelligence and surveillance requirements concerning the neutralized forces while allowing for the employment of valuable intelligence assets elsewhere in the conflict.

Similarly, non-lethal weapons are viewed as posing battle damage assessment (BDA) problems.³⁶ Since the effect of a non-lethal weapon may be difficult to confirm, prudence may necessitate multiple non-lethal strikes against a single target, but this problem is not unique to non-lethal systems. In past conflicts, military planners using lethal weapon systems have struggled with how to obtain an accurate BDA, and the BDA problem is expected to continue whether non-lethal or lethal weapon systems are employed.

Non-lethal technology has been called Pandora's box.³⁷ In simple terms, there is a fear the United States will develop technology which may in

³⁵ Lieutenant Colonel Martin Stanton, U.S. Army, *Nonlethal Weapons: Can of Worms*, U.S. Naval Institute Proceedings, November 1996 at 60. But see Major Terry Van Williams, U.S. Marine Corps, *Filling An Operational Requirement: The Nonlethal Approach* 10 (February 13, 1998) (unpublished manuscript on file at the library of the Naval War College, Newport, Rhode Island).

³⁶ Lieutenant Colonel Greg R. Schneider, U.S. Air Force, *Nonlethal Weapons: Considerations for Decision Makers*, ACDIS Occasional Paper, (Champaign, Illinois: The Program in Arms Control, Disarmament and International Security, University of Illinois at Urbana-Champaign) (January 1997) at 23 and Major Harold C. Bass, U.S. Marine Corps, *Nonlethal Weapons and Conventional War: Facing the Issues and Dilemmas* 7 (February 13, 1998) (unpublished manuscript on file at the library of the Naval War College, Newport, Rhode Island).

³⁷ Pandora was the name of an infamous woman in Greek mythology. Her name means "all giving." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 849 (1994). She was created by Hephaestus at the direction of Zeus, and she was provided with beauty, feminine skills and cunning by the Olympian deities. The purpose for her creation was to punish all mankind for the act of Prometheus who, in defiance of the gods, had stolen fire from the heavens. As a dowry, Pandora was given a magic jar filled with every human sickness and evil. Although Pandora's amorous advances were rejected by Prometheus, they were welcomed by his brother, Epimetheus, who married her. Together, Pandora and Epimetheus were able to open the magic jar (referred to as Pandora's box) releasing all of the misfortunes and sorrows that now afflict humanity. See John A. Crow, *Greece: The Magic Spring* 95 (1970). The use of the term "Pandora's box" can be traced back to the famous quotation by Ernest Bevin, "[i]f you open that Pandora's Box you

the future be used against it.³⁸ This criticism fails to take into account that non-lethal technology is not solely developed or controlled by the United States. Around the world, many nations are creating non-lethal weapon systems. In reality, those who voice this criticism have a fear of the unknown, and by implication, feel that non-lethal technology should not be developed. This represents a very naive and irresponsible position. There will always be foreign governments and terrorists groups who will mimic the non-lethal technology as it is developed, but this problem is not new. Every effective weapon system in the world has been copied. The solution to this problem is for the United States to maintain its technological edge on the battlefield by pursuing new non-lethal technology and by controlling the deployment of that technology.

Non-lethal technology has been criticized because it raises unrealistic expectations that battles may be fought without death, serious injury or property damage.³⁹ This criticism is similar to the earlier discussion involving the term "non-lethal." As was indicated, this will continue to be a problem since the potential for death, serious injury and property damage is always present whether non-lethal or lethal weapon systems are used. However, the likelihood of such results is significantly reduced when non-lethal technology is employed.

A commonly voiced viewpoint about non-lethal weapons is that any money budgeted for them is money wasted or money that could be better spent to improve the precision and accuracy of lethal weapon systems because non-lethal technologies do not work. Those who support this criticism have been misinformed because non-lethal systems really do work. They also have failed to consider the need for more humane weapon systems, and the U.S. military's need to maintain technological superiority on the battlefield. The current economic, diplomatic and political demands shaping U.S. policy will require future military operations to minimize casualties not only to U.S. military forces but also to civilian property and noncombatant personnel (civilians).⁴⁰ In

never know what Trojan [h]orses will jump out." THE OXFORD DICTIONARY OF QUOTATIONS 44 (3rd ed. 1979).

³⁸ *Supra* note 33, at ix. See also the argument that the movement by the industrialized nations into "non-lethality could pry open a Pandora's box of chemical, biological, and nuclear weaponry that diplomats have spent much of the 20th century trying to keep closed." T. E. Ricks, *Nonlethal Arms: New Class of Weapons Could Incapacitate Foe Yet Limit Casualties; Military Sees Role For Lasers, Electromagnetic Pulses, Other High-tech Tricks, Sticky Roads, Stalled Tanks*, WALL ST. J., Jan. 4, 1993, at A1.

³⁹ *Supra* note 33, at xi.

⁴⁰ Harvey M. Sapolsky, *War Without Killing*, U.S. Domestic and National Security Agendas: Into the Twenty-first Century 27-40 (Sam C. Sarkesian and John Mead Flanagan eds., 1994). U.S. military commanders involved in future conflicts must be very attuned to the Cable News Network (CNN) factor. Although the law of war requires commanders to minimize collateral damage and incidental injury, future political demands may go well beyond what is required by the law of war. Commanders should expect American reporters and camera crews to bring the horror of the dead and the cries of the wounded into the living rooms of the American people

a very cynical fashion, the following observation brings into focus this very point since the use of non-lethal weapons could be "extremely valuable in intervention where the 'CNN effect' puts a great premium on minimi[z]ing or eliminating casualties, particularly among non-combatants."⁴¹ In reality, the cost of non-lethal technology is minuscule in comparison to the money currently budgeted for lethal weapon systems.⁴² It might even be argued that non-lethal weapon systems are very cost effective because they give the commander additional capabilities for mission accomplishment at a minimal cost.

E. Categories of Non-Lethal Weapon Systems

Today, the increase in the number of non-lethal technologies and their diverse capabilities continues at a rapid pace. Since the growth in new non-lethal technology appears to be unlimited, it presents a unique challenge to the newly established Joint Non-Lethal Weapons Directorate (JNLWD).⁴³ The JNLWD was established on July 7, 1997, through the aggressive efforts of the Marine Corps, the executive agent for the Department of Defense Non-lethal Weapons Program.⁴⁴ The purpose behind the creation of the Directorate was to develop a clearinghouse for unclassified non-lethal technology information, to serve as a lightning rod for all Department of Defense non-lethal weapons matters and to create one single governmental entity responsible for coordinating the actions ongoing in the non-lethal technology arena.

Accomplishing these lofty goals will not be easy. The first challenge for the JNLWD is to organize the non-lethal technologies that are available and those that are under research in a manner that permits optimum support to each of the military services. So far, the Directorate has reviewed all currently available non-lethal technologies to eliminate those systems that seem impractical for military use. According to the Director of the JNLWD, an

through television. Politically, this means the commander must utilize those weapon systems which will accomplish the mission while simultaneously reducing the CNN impact at home. For some missions, non-lethal weapon systems may be the solution by providing a use of force acceptable to political leaders and to the American public.

⁴¹ This is a quotation from Richard L. Garvin, an eminent United States weapons expert. Malcolm Dando, *A New Form of Warfare* 9 (1996). For a discussion of the historical underpinnings of the present Department of Defense policy regarding access by journalist to U.S. military operations see Colonel James P. Terry, U.S. Marine Corps (Retired) *Press Access To Combatant Operations in the Post Peacekeeping Era*, 154 MIL. L. REV. 1 (October, 1997).

⁴² The long range budgetary planning for non-lethal technology calls for spending \$164 million per year through 2003. Mark Walsh, *Pentagon Programs \$164 Million for Non-Lethals Through 2003*, *Defense Week*, January 13, 1997. The defense budget for fiscal year 1997 was \$249,994,000,000.00. See Appendix B to the *Annual Report to the President and the Congress* (Office of the Secretary of Defense April 1997).

⁴³ Marine Corps News Release # 481, Subj: *Marine Corps Executive Agent for Non-Lethals; New Office Now Open* (July 18, 1997).

⁴⁴ The Marine Corps was designated the executive agent of the Non-Lethal Weapons Program by the Department of Defense on July 9, 1996. DOD DIR. 3000.3, *supra* note 9, at 1.

initial screening of over one hundred different non-lethal technologies resulted in the approval of 14 separate multiservice programs.⁴⁵ In the future, the JNLWD may request recommendations on specific non-lethal technologies from the newly established Institute for Non-Lethal Defense Technologies at the Applied Research Lab of Pennsylvania State University.⁴⁶

The next step facing the Directorate is to divide the screened non-lethal weapon systems and those still under research into major categories based upon their primary use or capability. For this type of division to be helpful the number of primary categories should be few in number, broad in scope and simple to understand. Under each primary category, sub-categories may be developed. Using this type of structure, the current non-lethal technologies available or under research may be lumped into three primary categories: (1) technologies that attack or enhance material systems and infrastructure; (2) technologies that attack an adversary's information systems or enhance intelligence gathering, surveillance and security; and (3) technologies that attack or enhance human frailties and functions. Although the potential capabilities of some non-lethal weapon systems might allow their placement in multiple categories or sub-categories, they have been placed under the primary category and sub-category which best describes their usage. In addition, the different types of missions should be identified where the non-lethal weapons of each category will be most useful.

1. Technologies That Attack Or Enhance Material Systems And Infrastructure

This primary category involves those non-lethal technologies that have the capability to cause degradation or enhancement to equipment, material systems and infrastructure. Some of the missions where the capability represented by these non-lethal weapons may be very useful are: counterdrug; peacekeeping; peace enforcement; humanitarian assistance; denial of movement; sanction enforcement; counter-terrorism; countersniper; counter guerrilla; electronic attack; movement to contact; ground attack; close

⁴⁵ For the fiscal year (FY) 98/99, funds were allocated for the following 14 multiservice programs: Non-lethal Crowd Dispersal; Acoustics Bio-Effects; Modular Crowd Control Munition; Ground Vehicle Stopper and Maritime Vessel Stopper; Speed Bump (Net); Active Denial Technology; 66 MM Vehicle Launched Payloads; UAV Non-lethal Payloads; Bounding Non-lethal Munitions; Canister Launched Area Denial System; Foam Applications; Acoustic Generators; Vortex Ring Gun; and Under Barrel Tactical Payload Delivery System. Joint NLW Directorate News, Vol. 1, No. 4, February 1998 at 1 and with Colonel Andy Mazzara, U.S. Marine Corps, Director of the JNLWD, on January 8, 1998.

⁴⁶ The new Institute for Non-Lethal Defense Technology opened its doors officially on November 21, 1997. Part of the initial work for the institute will involve the Human Effects Advisory Panel (HEAP). The HEAP will review data from tests conducted on new non-lethal technologies and help with the development of evaluation criteria. Joint NLW Directorate News, Vol. 1, No. 4, February 1998 at 2. For a discussion supporting the need for linkage between the university community and the military-related science and technology for non-lethal weapons see Colonel Dennis B. Herbert, U.S. Marine Corps (Retired), *When Lethal Force Won't Do*, U.S. Naval Institute Proceedings, February 1998 at 47.

air support; offensive air missions; pursuit; riverine assault; strategic attack; suppression of enemy air defense; air defense; barrier and mine warfare; countermechanized; counterpursuit; amphibious assault; facilities seizure; search and rescue; raids; disabling command and control communications; industrial sabotage; aviation sabotage; vehicle disablement; delaying enemy advance or attack; disabling vessels, submarines and naval mines; and counterproliferation of weapons of mass destruction. Non-lethal technologies available or under research that exhibit the capability to degrade or enhance equipment, material systems and infrastructure under this category would include:

- Acoustic (Acoustic bullets that cause resonant oscillations in physical structures)⁴⁷
- Battlespace Affectors (potential replacement for conventional lethal landmine)⁴⁸
- Biodeterioration (micro-organisms which attack specific materials)⁴⁹
- Caltrops (metal jacks used to puncture tires on motor vehicles)⁵⁰
- Combustion Modifiers and Fuel Viscosifiers (chemical additives which change fuel characteristics)⁵¹
- Combustible Dispersants (substances which burst into flame or explode when contact with the treated surface is made by motor vehicles or personnel)⁵²
- Computer Viruses (to cause the malfunction of automatic data processing systems)⁵³
- Concentrated Electromagnetic Pulse (a non-nuclear generated pulse disrupting electronic equipment including motor vehicles with electronic ignitions)⁵⁴

⁴⁷ Maruyama, *supra* note 25, at 13.

⁴⁸ Williams, *supra* note 35, at 1-17. Major Williams defines the "battlespace affectors" as "any device explicitly designed to be placed in a specific location, activated by the presence or contact of a person(s) or vehicle(s), to incapacitate personnel or vehicles, while minimizing fatalities, permanent injury or undesired damage." *Id.* at 5. He states that the greatest application potential rests with "battlespace affectors" using one of the following non-lethal technologies: "acoustic, chemical, electric[al], electromagnetic, mechanical, or optical." *Id.* at 6.

⁴⁹ Vincent Kiernan, *War Over Weapons That Can't Kill*, New Scientists, December 11, 1993 at 14 and Lewer, *Medicine and War*, *supra* note 13, at 80 (1995).

⁵⁰ Maruyama, *supra* note 25, at 25.

⁵¹ Lewer, *Medicine and War*, *supra* note 13, at 80 and Maruyama, *supra* note 25, at 25.

⁵² Lewer, *Medicine and War*, *supra* note 13, at 80.

⁵³ Paul Evancoe and Mark Bentley, *CVW -- Computer Virus as a Weapon*, Military Technology, May 1994 at 38-40 and Lewer, *Medicine and War*, *supra* note 13, at 82.

⁵⁴ Maruyama, *supra* note 25, at 23.

- Conductive Ribbons (carbon fibers used to cause electrical disruptions and short out power grids)⁵⁵
- Defoliants (remove vegetation that could be used for concealment)⁵⁶
- Depolymerizers (polymers that dissolve adhesives)⁵⁷
- Electronic and Optical Jamming (electronic warfare devices)
- Filter Clogging Materials (airborne materials designed to clog the air filters of combustion engines)⁵⁸
- High Power Microwave Fields (pulsed microwave beams to destroy electronics)⁵⁹
- Lasers Systems (targeting and guidance systems that detect, determine range, track, and guide, as well as, systems that blind or destroy enemy optical sensors)
- Liquid Metal Embrittlement (to cause treated metal to crumble and disintegrate)⁶⁰
- Motor Vehicle Electrical Arrestors (an electrical charge is directed at a motor vehicle as it passes which causes it to stop)⁶¹
- Motor Vehicle Obscurants (opaque covering to block windows and sensor lens)⁶²
- Motor Vehicle Taggers (a projectile delivered transmitter tag with polymer adhesive to allow a vehicle to be tracked)⁶³
- Soil Destabilizers (changes soil properties reducing traction for motor vehicles)⁶⁴
- Super Adhesives (used to prevent movement by motor vehicles and personnel)⁶⁵
- Supercaustics or Super Corrosives (dissolve most metals, plastics, rubber, polymers, and glass)⁶⁶

⁵⁵ Lewer, *supra* note 5, at 1; Fulgham, *supra* note 5, at 18-20; Maruyama, *supra* note 25, at 24; and Lewer, *Medicine and War*, *supra* note 13, at 80. See also 60 Minutes: CBS broadcast television, *supra* note 5.

⁵⁶ Lewer, *Medicine and War*, *supra* note 13, at 81. See also *Herbicides in War: The Long-term Ecological and Human Consequences*, *supra* note 4 and Whiteside, *supra* note 4.

⁵⁷ Lewer, *Medicine and War*, *supra* note 13 at 80.

⁵⁸ Kiernan, *supra* note 49, at 14 and Lewer, *Medicine and War*, *supra* note 13, at 80.

⁵⁹ Lewer, *Medicine and War*, *supra* note 13, at 81.

⁶⁰ Maruyama, *supra* note 25, at 21.

⁶¹ *Id.* at 35.

⁶² *Id.* at 23.

⁶³ *Id.* at 36.

⁶⁴ U.S. DEP'T OF ARMY, *NONLETHAL CAPABILITIES IN ARMY OPERATIONS*, TRADOC Pam. 525-73, at 10 (1 September 1996). See also Lewer, *Medicine and War*, *supra* note 13, at 81.

⁶⁵ Lewer, *Medicine and War*, *supra* note 13, at 81 and Maruyama, *supra* note 25, at 25.

⁶⁶ Lewer, *Medicine and War*, *supra* note 13, at 80 and Maruyama, *supra* note 25, at 22.

- Superlubricants (chemicals which make surfaces extremely slippery)⁶⁷
- Weather Modification (such as inducing rainfall by the chemical seeding of clouds)⁶⁸

2. Technologies That Attack Or Enhance Intelligence Gathering, Surveillance Or Security

This primary category involves those non-lethal technologies that have the capability to either attack an adversary's information based systems or to enhance intelligence gathering, surveillance and security. Some of the missions where the capability represented by these non-lethal weapons may be very useful are: location and identification of weapons of mass destruction; air reconnaissance; surface reconnaissance; aerial surveillance; rear area security; security for enemy prisoner of war (EPW) camps; and protection and security for base camps and installations. Non-lethal technologies available or under research that exhibit the capability to attack or enhance information based systems, intelligence gathering, surveillance and security under this category would include:

- Collection and Decipherment of Scrambled Communication (decoding of sophisticated electronic communications)⁶⁹
- Computer Moles/Worms (computer programs designed to penetrate into enemy automatic data processing systems and report back specific datum)⁷⁰
- Electronic Smart Dust (microelectromechanical airborne particles that relay reconnaissance information)⁷¹
- Ground Penetrating Radar (system designed to detect subsurface man-made structures)⁷²
- Robotic Land Probes (systems capable of gathering and relaying information of surface activity)
- Seeing Through Walls (radar and acoustic systems that provide images of what is located behind walls)⁷³
 - Nonimaging Portable Radar (portable acoustic system designed to detect motion behind nonmetallic walls)⁷⁴

⁶⁷ Maruyama, *supra* note 25, at 24.

⁶⁸ Lewer, *Medicine and War*, *supra* note 13, at 81.

⁶⁹ *A World of Insecurity Remains*, *Jane's Defense Weekly*, November 12, 1994 at 33-35.

⁷⁰ *Nonlethal Capabilities In Army Operations*, *supra* note 64 at 9.

⁷¹ Mark Walsh, *Dirty Little Spies*, *Army Times*, June 9, 1997 at 34.

⁷² *Non-Lethal Weapons: Terms and References 2* (Robert J. Bunker ed., July 1997).

⁷³ Maruyama, *supra* note 25, at 36.

⁷⁴ *Non-Lethal Weapons: Terms and References*, *supra* note 72, at 6.

- Unmanned Aerial Vehicles (UAV) (used to gather information of surface activity from the air through cameras, infrared sensors, radars, microprocessors and transmitters)⁷⁵

3. Technologies That Attack Or Enhance Human Frailties And Functions

This primary category consists of those non-lethal technologies that are capable of attacking or enhancing human frailties and functions. It is by far the largest of the three primary categories. Some of the missions where the capability represented by these non-lethal weapons may be very useful are: riot control (civil disturbances); public safety; assistance to law enforcement (siege or dynamic entry); curfew enforcement; hostage release; isolation of insurgents; counter-ambush; ambush; denial of enemy base areas; facility denial; escape and evasion; and psychological. Many of the non-lethal technologies that fall into this category were initially developed for use by law enforcement personnel. Non-lethal technologies available or under research that exhibit the capability to attack or enhance human frailties and functions under this category would include:

- Acoustic Pulses (high-frequency sound pulses designed to cause blunt-object trauma)⁷⁶
- Claymore Mine With Blunt Object Projectiles (kinetic system designed for crowd control and security that propels blunt impact objects such as sting balls)⁷⁷

⁷⁵ David Wood, *Do We Really Need Fighter Pilots?*, Staten Island Advance (November 4, 1997). Engineers at Lockheed Martin are currently working on the newest version of an unmanned aerial vehicle called the Uninhabited Combat Air Vehicle (UCAV). The UCAV employs non-lethal intelligence gathering capabilities while also being able to be used for suicide-like strikes against an enemy destroying itself if necessary to accomplish the mission. Robert Holzer, *UAVs Someday Could Be Launched From a Sub*, Navy Times, November 3, 1997 at 31. The Department of Defense is looking at the development of a tiny airplane about 15 centimeters in length to conduct reconnaissance and communication operations. This airplane would also be capable of conducting lethal missions when necessary. The advantage this capability presents is low cost and unobtrusiveness. George Seffers and Mark Walsh, *Stealth That Fits In Your Hand*, Navy Times, November 24, 1997 at 34. Testing of a new UAV non-lethal strike capability developed under the UAV Non-Lethal Payload Program is set for the Fall of 1998 aboard a Navy ship. If the test goes well, this UAV system may soon become a reality for deploying forces. Joint NLW Directorate News, Vol. 1, No. 4, February 1998 at 3. Another capability being adapted for use with the UAV is a new minefield detection system which will sense and map minefields from the surf zone inland. *UAV Mine-Finder on Tap*, Navy Times, February 9, 1998 at 32.

⁷⁶ Lewer, *Medicine and War*, *supra* note 13, at 81. See also *Non-Lethal Weapons: Terms and References*, *supra* note 72, at 2.

⁷⁷ *Non-Lethal Weapons: Terms and References*, *supra* note 72, at 21.

- Counter Sniper Systems (electronic systems which allow pinpointing of a sniper and return fire within 2 seconds)⁷⁸
- Curdler Unit (a system designed to produce a very loud shrill noise which is used to irritate and disperse rioters)⁷⁹
- Dazzling Lasers (lasers designed to cause temporary blindness from 12-24 hours)
- Deference Tones (systems used to project a voice or sound to another location)⁸⁰
- Disinformation Campaigns (techniques designed to influence or persuade groups against their interest)⁸¹
- Electrical Water Stream (systems using charged water stream to immobilize or stop an adversary)⁸²
- Entangling Nets (sticky nets and high voltage nets fired from a 40 MM grenade launcher to stop or subdue a fleeing or disorderly individual)⁸³
- Foaming Agents (designed to impair mobility and vision)⁸⁴
- Grenade Launched Projectiles (same rounds below may be delivered by hand thrown means)
 - Multiple Baton Wood Round (used to create forced entry diversions)⁸⁵
 - Multiple Foam Rubber Round (used to stun or knock down an adversary)⁸⁶
 - Stinger Round (round containing multiple rubber balls used to stun or knock down an adversary)⁸⁷
- Holographic Projections (used for misinformation campaigns)⁸⁸

⁷⁸ John G. Roos, *Nowhere To Hide: High Tech Counter-Sniper Systems Unmask Urban Terrorists*, *Armed Forces Journal International* 18 (July 1996).

⁷⁹ Non-Lethal Weapons: Terms and References, *supra* note 72, at 2.

⁸⁰ *Id.* at 2.

⁸¹ Lewer, *Medicine and War*, *supra* note 13, at 82.

⁸² Non-Lethal Weapons: Terms and References, *supra* note 72, at 12.

⁸³ Maruyama, *supra* note 25, at 41. *See also* Nonlethal Capabilities In Army Operations, *supra* note 64, at 8.

⁸⁴ Nonlethal Capabilities In Army Operations, *supra* note 64, at 8. *See also* Lewer, *Medicine and War*, *supra* note 13, at 81.

⁸⁵ Maruyama, *supra* note 25, at 39.

⁸⁶ *Id.* at 39.

⁸⁷ *Id.* at 39.

⁸⁸ Holograms may be used to cause fear among the target population and to generate psychological unrest. Examples of holograms that might be used include religious imagery or images of forces that do not exist. A number of other C2 and PSYOP uses may be made of this type of technology depending on the specific mission (information warfare, etc.). *See* Non-Lethal Weapons: Terms and References, *supra* note 72, at 15 and Lewer, *Medicine and War*, *supra* note 13, at 82.

- Incapacitating or Calmative Agents (biomedical agents that may be absorbed through the skin or delivered by airborne means designed to incapacitate)⁸⁹
- Infrasound (low-frequency sound designed to cause disorientation and physical discomfort)⁹⁰
- Laser Protection (system designed to protect against lasers by blocking the wavelength, reflecting through optical coatings or absorbed using dyes)⁹¹
- Markers (systems designed to identify personnel through some form of marking)⁹²
- Mind Control (subliminal visual and audio messages)⁹³
- Obscurants (systems designed to disorient and to obscure observation)⁹⁴
- Odoriferous Agents (non-toxic systems designed to create extremely unpleasant odors)⁹⁵
- Optical Munitions (flash systems designed to temporarily blind or disorient)⁹⁶
- Photic Driver (a system designed for crowd control which uses ultrasound and flashing infrared lights to penetrate closed eyelids)⁹⁷
- 12 Gauge Shotgun Shell Projectiles
 - Bean Bags (nylon bean bags designed to stun or knock down an adversary)⁹⁸
 - Hardwood batons (wooden projectiles used to stun or knock down adversary)⁹⁹
 - Rubber Pellets (rubber pellets fired at high velocity to stun or knock down an adversary)¹⁰⁰

⁸⁹ Lewer, *Medicine and War*, *supra* note 13, at 81.

⁹⁰ *Id.* at 81.

⁹¹ Non-Lethal Weapons: Terms and References, *supra* note 72, at 5.

⁹² Nonlethal Capabilities In Army Operations, *supra* note 64, at 9.

⁹³ Lewer, *Medicine and War*, *supra* note 13, at 81.

⁹⁴ Nonlethal Capabilities In Army Operations, *supra* note 64, at 9.

⁹⁵ *Id.* at 8. See also Leila Cobo-Hanlon, *The Goods at Arm's Length; From Panic Button To Odor Deterrents, There's A Billion Dollar Market Just Waiting to Help You Increase Your Sense of Security -- Even If You Have To Leave Your Home*, Los Angeles Times, October 8, 1996 at E3.

⁹⁶ Lewer, *Medicine and War*, *supra* note 13, at 81.

⁹⁷ Non-Lethal Weapons: Terms and References, *supra* note 72, at 4.

⁹⁸ Maruyama, *supra* note 25, at 38.

⁹⁹ *Id.* at 38.

¹⁰⁰ Lewer, *Medicine and War*, *supra* note 13, at 82 and Maruyama, *supra* note 25, at 38.

- Riot Control Agents
 - Chlorobenzylidenemalonitrile (CS) gas (used to cause disorientation and crowd control)¹⁰¹
 - Oleoresin Capsaicin (OC) (a naturally occurring inflammatory found in cayenne pepper used to cause disorientation and crowd control)¹⁰²
- Rubber Bullets (rubber projectiles designed to inflict pain without penetrating)¹⁰³
- Sponge Grenade Round (40 MM foam round used to stun or knock down an adversary)¹⁰⁴
- Stun Guns (systems that use electric shock to stun and immobilize)¹⁰⁵
- Voice Synthesis/Morphing (system designed to produce the voice and image of an adversary used to deceive or gain access)¹⁰⁶
- Vomiting Agents (agents designed to cause nausea and vomiting by personnel)¹⁰⁷
- Ultrasound (an acoustic system using high frequency sound whose wavelength is outside the audible band)¹⁰⁸
- Water Cannon (system designed to produce a stream of water under very high pressure for crowd or riot control)¹⁰⁹

III. Selecting Non-Lethal Weapon Systems

In today's military, there is always pressure to do things faster, but as experienced commanders know, it inevitably takes time to reach sound conclusions on important matters. When the issue involves what non-lethal weapons systems to take on an operation, the commander must be prepared to deal with a very time consuming selection process to determine the particular system to employ.

¹⁰¹ Maruyama, *supra* note 25, at 39. This non-lethal weapon system may also be delivered in conjunction with a stinger grenade containing rubber projectiles.

¹⁰² Maruyama, *supra* note 25, at 39. Message, 312020Z Jul 98, Commandant Marine Corps, pp 10, Subject: Marine Corps Training and use of Oleoresin Capsicum (OC) Spray (Guidance on training and use of pepper spray).

¹⁰³ Alexander and Klare, *supra* note 13, at 68.

¹⁰⁴ Maruyama, *supra* note 25, at 39.

¹⁰⁵ Lewer, *Medicine and War*, *supra* note 13, at 82.

¹⁰⁶ Nonlethal Capabilities In Army Operations, *supra* note 64, at 9.

¹⁰⁷ *Id.* at 8.

¹⁰⁸ Non-Lethal Weapons: Terms and References, *supra* note 72, at 3.

¹⁰⁹ Nonlethal Capabilities In Army Operations, *supra* note 64, at 8.

A. Determining the Capability Needed

As illustrated by the actions taken by General Zinni and his staff during Operation United Shield, the selection and acquisition of non-lethal weapon systems can be difficult. The starting point for any commander is to determine the specific capabilities that are necessary to accomplish the expressed and implied taskings contained within the mission. Because these taskings may call for several different capabilities, the commander may require multiple non-lethal weapon systems.

When determining the non-lethal capabilities needed, the commander should also look at both positive and negative oriented capabilities for each of the primary categories. This means that commanders should be as concerned about finding non-lethal capabilities that would enhance or improve the effectiveness of their personnel as they are about finding capabilities that will stymie the adversary's personnel. As an example of positive capabilities for operations in non-English speaking countries, the commander might look for non-lethal technology that would provide translation aid to assigned personnel or for increased force protection and life-saving through a non-lethal technology that warns force personnel of danger by identifying approaching individuals who are carrying concealed weapons or explosives.¹¹⁰

B. Knowledge of Systems Available

Next, the commander must become familiar with the non-lethal weapon systems in the U.S. inventory, as well as, the non-lethal technology currently being used in the civilian community. A solid working knowledge of the non-lethal technologies available is essential to the commander's selection process. At first blush, this appears to be an overwhelming task; the critical elements for the commander are the expenditure of valuable time and personnel assets to develop the requisite knowledge. In addition to these issues, another stumbling block to the commander involves the cloak of secrecy that usually surrounds new non-lethal weapon systems. Since most commanders are unaware of even the unclassified non-lethal systems, adding a cloak of secrecy erects another artificial barrier which must be overcome. The classification of emerging technology is the military's response to the fear that if a new system becomes widely known, hostile forces will develop countermeasures or will copy the system for use against U.S. forces. Because of this, the commander may be unaware of systems that are highly classified. Currently, the U.S. weapons inventory has only a modest non-lethal capability. Many of the more exotic capabilities are still five years or more away from being approved for use.¹¹¹

¹¹⁰ *Operations Other Than War*, *supra* note 13, at 29.

¹¹¹ Discussion with Colonel Andy Mazzara, U.S. Marine Corps, Director of the JNLWD, on January 8, 1998.

For Operation United Shield, the I MEF staff faced the same time constraints, manpower constraints and secrecy problems in determining which non-lethal weapon systems were to be selected.¹¹² The magnitude of the effort required to obtain the necessary knowledge and information exposed the seriousness of this problem. Since there was no Department of Defense office responsible for the compilation or dissemination of information concerning non-lethal technology, General Zinni's staff was forced to seek information from a variety of military and civilian sources as well as ongoing research projects. For future commanders, Operation United Shield highlighted the issue of where does the commander, faced with a time sensitive operation, obtain the knowledge necessary to select and acquire suitable non-lethal weapons?

The Marine Corps, as the executive agent for the Department of Defense Non-Lethal Weapons Program, has made tremendous strides toward streamlining the selection and acquisition process through the establishment of the JNLWD. As the JNLWD develops its niche, it hopes to become the central clearing house for compiling and disseminating information on non-lethal technologies.¹¹³ The Directorate has been made more accessible to commanders and their staffs through a Joint Non-Lethal Weapons Program Website with a comprehensive non-lethal weapon systems database.¹¹⁴ Furthermore, the Marine Corps has negotiated a Memorandum of Agreement with the other military services and the United States Special Operations Command to use the JNLWD to coordinate the implementation of non-lethal weapons programs. Under this Memorandum, the JNLWD's oversight only focuses on programs at the tactical level and does not extend to those service programs whose goal is to achieve a wider (theater/strategic level) military objective.¹¹⁵ During the Joint Non-lethal Weapons Standing Rules of Engagement Development Conference on January 7, 1998, the Director of the JNLWD indicated a new initiative was being sponsored by the JNLWD to modify this Memorandum of Agreement.¹¹⁶ The proposed modification would

¹¹² General Zinni's staff canvassed civilian law enforcement agencies and civilian and military research facilities to evaluate the suitability of non-lethal technologies for use during Operation United Shield. Colonel Lorenz, *supra* note 2, at 70.

¹¹³ For information concerning the new non-lethal technologies available, the Director of the JNLWD may be reached by telephone at (703) 784-1977/2951/2997 or DSN 278-1977/2951/2997. Marine Corps News Release # 481, *supra* note 43 at 1.

¹¹⁴ Joint NLW Directorate News, Vol. 1, No. 2, October 1997 at 3. The Joint Non-Lethal Weapons Program Website may be accessed on the internet at <http://www.hqmc.usmc.mil/nlw/nlw.nsf>.

¹¹⁵ Memorandum of Agreement, Subj: *DoD Nonlethal Weapons (NLW) Program* (January 21, 1997). [hereinafter memorandum]

¹¹⁶ Colonel Andy Mazzara, U.S. Marine Corps, Director of the JNLWD, introductory remarks at the Joint Non-lethal Weapon Standing Rules of Engagement Development Conference in Quantico, Virginia (January 7, 1998.) See also messages R 041445Z Dec 97 and R131217Z Jan 98, Commandant of the Marine Corps.

allow oversight of all non-lethal weapons programs at the strategic as well as the tactical level. This Memorandum of Agreement also establishes the procedures required in Public Law 104-106, Section 219 - "Nonlethal Weapons Study" by making the Commandant of the Marine Corps, in conjunction with the other military services, Department of Defense agencies and the Unified CINCs, the primary conduit for reviewing, coordinating, and integrating new non-lethal weapons programs and making recommendations on those programs to the Under Secretary of Defense (Acquisition and Technology).¹¹⁷

C. Other Selection Factors

Once the desired capabilities have been determined and the availability of the systems which can provide those capabilities have been ascertained, other factors to be considered in the selection process are training, logistical support (mobility), quantity and spare parts requirements, combat load, environmental limitations, characteristics of the system, and cost. The training required for the use of some non-lethal weapon systems is not only difficult and expensive, but also very time consuming. For this reason, it may be important to know whether the training for the system is compatible with or complements the training the unit has scheduled for the traditional lethal weapon systems.¹¹⁸ In addition, to evaluate the full impact of the training, the commander may need to know whether or not a special land based training facility will be required. If such a training facility is needed, additional time and money would need to be set aside to meet this requirement since this training could not be accomplished during normal transit (either by ship or by air) to the area of operation.¹¹⁹

Similarly, logistical support for the non-lethal weapon system selected is important. In simple terms, the commander must consider the system's mobility. For most operations, commanders will have a limited amount of aircraft lift and ship's cargo space available to move their units and equipment into the area of operation. Due to these space constraints, the size of the non-lethal logistical footprint becomes crucial. To further complicate the space constraint issue, there is normally no one who has had prior experience with moving that particular system, handling the size of the system (to include the number of individual systems needed by the unit along with their spare parts), and managing the special transportation restrictions.¹²⁰ For example, the commander of a Marine Expeditionary Unit (MEU) might have to decide whether to leave behind an artillery piece from its normal combat table of

¹¹⁷ Memorandum of Agreement, *supra* note 115, at 2.

¹¹⁸ Colonel Lorenz, *supra* note 2, at 74.

¹¹⁹ For a detailed discussion of the training required for non-lethal weapons see pages 26-29.

¹²⁰ Some non-lethal weapon systems may be highly flammable, involve caustic chemicals, or other dangerous items which require unique shipping and transportation measures.

equipment (T/E) in order to accommodate the space needed to support a non-lethal weapon system.

The importance of selecting a non-lethal weapon system which has adequate or sufficient spare parts cannot be overstated. No weapon system should ever be fielded without the necessary means to replace or repair those parts subject to malfunction or breakage. For non-lethal weapon systems, this type of information will have greater significance if the manufacturer has a limited number of spare parts in stock and the manufacturing process for the spare parts is a lengthy or costly process.¹²¹

Another important element to be considered for ground forces during the selection process is the combat load. Combat load refers to the required items each military member of the ground force must carry for the operation. Included in most combat loads are such items as a pistol or rifle, ammunition, helmet, flak jacket, gas mask, poncho, sleeping bag, water, food, first aid items, maps, compass, bayonet, pocket knife, lighter, field coat and additional clothing. These items are normally carried within an Alice pack or on an h-harness or a war belt. If the non-lethal weapon selected would require each Soldier or Marine to carry a substantial increase in volume or weight, it could affect unit maneuverability and foot speed.

Some non-lethal weapons are more effective than others in certain types of terrain, environments or weather conditions. If these limitations exist, the commander needs to be aware of them. During the selection process, the commander should concentrate on those systems that work best in the expected combat environment for that operation. In addition, the commander needs information about the durability of each system (including components) that may be selected. The selection process should exclude those systems which are not reliable under austere conditions or have historical track records indicating frequent malfunction or breakage.¹²² Those non-lethal weapon systems that require a relatively sterile environment to function should ordinarily not be selected.

The characteristics of the non-lethal weapon systems being considered for selection are also critical. The commander needs detailed information on the following traits for each system under consideration: nature and duration

¹²¹ See Colonel Lorenz, *supra* note 2, at 70 and Commander M. E. McWatters, U.S. Navy, Beanbags and Foam: All Snickering Aside 13 (June 13, 1997) (unpublished manuscript on file at the library of the Naval War College, Newport, Rhode Island).

¹²² Often the deficiencies of a non-lethal weapon system will not be discovered until the system is actually used in training or deployed on the battlefield. For example, the testing, training and deployment of sticky foam highlighted the following inadequacies: difficult to aim; applicator was expensive, of limited capacity and fragile; and it presented an entanglement problem for any U.S. military personnel who approached a sprayed individual. Colonel Lorenz, *supra* note 2, at 76.

of effect, delivery system requirements, "standoff" capability,¹²³ area of coverage, range, weight, interoperability with other lethal and non-lethal weapons, manpower requirements, and maneuverability. Without this information, the commander is making the selection in the dark. A comparison of these traits for multiple systems which offer almost the same capability gives the commander a valuable decision making tool.

Given today's shrinking defense budgets, cost will always be an important selection factor. If "operation and maintenance" funding will be used, the commander may require the staff to do a cost benefit analysis of those non-lethal weapon systems that are being considered. This will provide more objectivity on the cost issue. A cost benefit analysis that compares the specific cost of each system with the capability provided by each may give the commander useful insight into which systems provide the optimum utility for the money spent.

D. Requirement For Legal Review

Aside from the selection issues already discussed, the non-lethal weapon systems selected by the commander for use on the operation may not have been approved for inclusion within the U.S. weapons inventory. This problem involves the requirement for a legal review.¹²⁴ No weapon system may be used by U.S. military forces in armed conflict unless it has successfully completed the legal review process. All weapon systems included within the U.S. weapons inventory have successfully passed a legal review. Those systems which fail to pass the legal review are considered illegal weapon systems and may not be used by U.S. military forces. The legal review required for non-lethal weapon systems is the same as the review required for lethal weapon systems. The purpose for the legal review of munitions and weapon systems is to ensure that their intended use is consistent with the obligations of the United States under customary international law and the law

¹²³ "Standoff" capability refers to the optimum distance from the party against whom the non-lethal weapon will be applied to achieve the desired result. For example, some non-lethal weapons such as pepper spray or riot batons have no "standoff" capability since their use is limited to direct confrontations.

¹²⁴ Conducting the legal review for all non-lethal weapons is a specific duty imposed upon the Secretaries of the military departments and the CINC, United States Special Operations Command. DoD Dir. 3000.3, *supra* note 9, at 3. In addition, there are several other regulations that require a legal review for all weapon systems which will be procured to meet a military requirement of the armed forces of the United States. See U.S. DEP'T OF DEFENSE Dir. 5000.1, *Defense Acquisition* (March 15, 1996) and U.S. Dep't Of DEFENSE REG. 5000.2-R, MANDATORY PROCEDURES FOR MAJOR DEFENSE ACQUISITION PROGRAMS (MDAPS) AND MAJOR AUTOMATED INFORMATION PROGRAMS (MAIS) ACQUISITION (March 15, 1996). The service regulations implementing the Department of Defense guidance concerning the legal review of weapon systems are: U.S. DEPT OF ARMY REG. 27-53, *Review of Legality of Weapons Under International Law* (January 1, 1979); U.S. Dept of Air Force Instruction 51-402, *Weapons Review* (May 13, 1994); and U.S. Dept of the Navy, Secretary of the Navy Inst. (SECNAVINST) 5000.2B, Subj: *Implementation of the Mandatory Procedures for Major and Non-Major Defense Acquisition Programs and Major and Non-Major Defense Information Technology Acquisition Programs* (December 1996).

of war treaties or arms control agreements to which the United States is a party. The review is premised upon the following three international law principles: (1) "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited;"¹²⁵ (2) "[i]t is especially forbidden . . . to employ arms, projectiles, or material calculated to cause unnecessary suffering;"¹²⁶ and (3) "[i]ndiscriminate attacks are prohibited. Indiscriminate attacks are: . . . those which employ a method or means of combat which cannot be directed at a specific military objective."¹²⁷ These three principles have become the basis for the two fundamental concepts now used to evaluate all weapon systems which the United States plans to use during armed conflict. The first concept prohibits a nation engaged in armed conflict from employing a weapon system that is designed to cause unnecessary suffering. The second forbids the use of a weapon system which cannot be directed specifically against a military objective and is therefore indiscriminate in its effect.

Since the non-lethal weapon systems purchased off-the-shelf for Operation United Shield were not contained in the U.S. weapons inventory, no prior legal review had been conducted on them. For General Zinni and his staff, the legal review requirement became a major obstacle since those systems could not be used until the legal review was complete.¹²⁸ The off-the-shelf

¹²⁵ 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Section II Hostilities [hereinafter 1907 Hague Convention IV], Art. 22, *reprinted in* Documents on the Law of War 52 (Adam Roberts and Richard Guelff eds., 1982). Article 22 of the 1907 Hague Convention IV is viewed as customary international law by the United States. *See* General Counsel, Department of Defense Letter to Senator Edward Kennedy (September 22, 1972), *reprinted in* 67 Am. J. Int'l Law 122 (1973).

¹²⁶ 1907 Hague Convention IV, Art. 23 (e), *reprinted in* Documents on the Law of War 52 (Adam Roberts and Richard Guelff eds., 1982). The rules set forth in the 1907 Hague Convention IV Arts. 22 and 23 (e) are confirmed in the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949 [hereinafter Protocol I], and Relating to the Protection of Victims of International Armed Conflict, Dec. 12, 1977, Part III, Section I, Art. 35, *reprinted in* Documents on the Law of War 409 (Adam Roberts and Richard Guelff eds., 1982). The United States considers these rules as confirmed by Article 35 of Protocol I declarative of customary international law. *See* General Counsel, Department of Defense Letter to Senator Edward Kennedy (September 22, 1972), *supra* note 126 and Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l L. & Pol'y 419, 424 (1987). *See also* Michael Bothe ET AL., *New Rules For the Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Convention of 1949*, 193-197 (1982).

¹²⁷ Protocol I, Art. 51(4), *reprinted in* Documents on the Law of War 415-16 (Adam Roberts and Richard Guelff eds., 1982). For further discussion on indiscriminate attacks *see* L. C. Green, *The Contemporary Law of Armed Conflict* 151-152 (1993) and *The Handbook of Humanitarian Law in Armed Conflicts* 111-113 (Dieter Fleck ed., 1995).

¹²⁸ Before the non-lethal weapon systems selected for Operation United Shield could be purchased off-the-shelf, a detailed review by Headquarters, U.S. Marine Corps was required. In light of the time factor, the evaluation and approval process was placed on a fast track and assigned to Colonel Gary W. Anderson, U.S. Marine Corps, at the Marine Corps Experimental Unit located at the Marine Corps Combat Development Command in Quantico, Virginia for coordination. As part of the approval process, a safety review was required. To meet this safety requirement and to move the process along quickly, the Marine Corps Systems Command issued a limited safety release and authorized the procurement of the selected non-lethal weapon systems. However,

weapon systems employed for Operation United Shield also highlighted the potential problem of purchasing weapon systems prior to the completion of the legal review. If a purchased system failed to pass the legal review, the command would be in the awkward position of having spent taxpayer dollars on a capability that it could not legally employ.

Since the legal review process is typically lengthy, it should be undertaken in conjunction with the acquisition process for each new weapon system. To avoid future problems such as those faced by General Zinni, a new Marine Corps order has been published which sets forth the uniform procedures to be followed by all Marine Corps commanders who desire to acquire and use non-lethal weapon systems.¹²⁹ This order distinguishes between non-emergency and emergency requests, the latter providing for an expedited review.¹³⁰ The reason for this distinction is to help the commander who is facing a time sensitive operation to select and acquire those non-lethal systems needed.

On December 4, 1995, to meet the demands for emerging and developing technologies and to support new contingencies, such as Operation Joint Endeavor,¹³¹ the U.S. Army Material Command Deputy Chief of Staff for

before the newly procured non-lethal weapon systems could be employed, a legal review of each was required. Colonel Lorenz, *supra* note 2, at 72.

¹²⁹ U.S. MARINE CORPS, ORDER 3430.7, MARINE CORPS PROGRAM FOR THE USE AND ACQUISITION OF NON-LETHAL WEAPONS (July 31, 1997) [hereinafter MCO 3430.7].

¹³⁰ *Id.* at 3. For the Marine Corps, the acquisition of non-lethal weapon systems involves the coordinated efforts of three separate commands. The actual acquisition of a non-lethal weapon system is the responsibility of the Commander, Marine Corps System Command (CBG). Determining non-lethal weapon requirements is the responsibility of the Commanding General, Marine Corps Combat Development Command (CG, MCCDC), and the responsibility for ensuring that the employment of the weapon is consistent with the policy in DoD Dir. 3000.3, *supra* is the responsibility of the Commandant, U.S. Marine Corps, Plans, Policies and Operations (PP&O) Department. As soon as a commander identifies an emergency need for a particular non-lethal weapon for the operation, the emergency acquisition process must be initiated. The emergency acquisition process begins with the submission of a Fleet Operational Needs Statement (FONS) to the CG, MCCDC along with an explanation of the special circumstances surrounding the request and the operational due date. In those circumstances where the commander desires a particular off-the-shelf weapon be purchased, the cost, make, model number, and manufacturer of the non-lethal weapon system must also be provided. Next, the FONS, along with the letter containing the special circumstances necessitating the purchase, will be routed concurrently to the CBG and to the cognizant offices of the Commandant, U.S. Marine Corps, Plans, Policies and Operations Department, Operations Division, Security (POS) and Operational Law Branch of the Judge Advocate Division (JAO) for a review to determine whether the acquisition will meet the Department of Defense policy and legal requirements. See the emergency acquisition procedures for non-lethal weapons in paragraph 5.b. of MCO 3430.7.

¹³¹ Operation Joint Endeavor was the name given to the U.S.-led NATO peace implementation operation in Bosnia-Herzegovina. Forces were deployed for this operation in response to the United Nations Security Council Resolution 1031. The mission for Operation Joint Endeavor was the enforcement of the provisions of the Dayton Peace Agreement. Lieutenant Commander Richard L. Brasel, U.S. Navy, Operation Joint Endeavor: *Operational Guidance From Principles of Operations Other than War* 1-15 (February 12, 1996) (unpublished manuscript on file at the library of the Naval War College, Newport, Rhode Island) and Lieutenant Colonel Christopher

Research, Development and Acquisition, directed the establishment of a new technology office.¹³² This office became known as the Bosnia Technology Integration Cell (BTIC). In light of the success of the BTIC, the Deputy Assistant Secretary of the Army decided to institutionalize this office within the Army Material Command. In July 1996, the BTIC officially became the Quick Response Office (QRO).¹³³ Like Marine Corps Order 3430.7, the QRO has an emergency response and acquisition capability regarding all types of material (to include non-lethal weapons).¹³⁴

IV. Training To Use Non-Lethal Weapon Systems

Training to use non-lethal weapons is paramount, for "[t]he instruments of battle are valuable only if one knows how to use them."¹³⁵ On the macro-level, each military service and the CINC, United States Special Operations Command has the responsibility to prepare, organize, supply, and equip its service members so that they are capable of accomplishing their mission. Incorporated within this responsibility is the duty to "[e]nsure the development and implementation of employment concepts, doctrine, tactics, training, security procedures, and logistical support for . . . non-lethal weapon systems."¹³⁶

M. Fleck, U.S. Marine Corps, *Just Do Something: Measuring and Achieving Success in Peace Operations* 13-15 (November 14, 1997) (unpublished manuscript on file at the library of the Naval War College, Newport, Rhode Island).

¹³² Brigadier General Roy E. Beauchamp, U.S. Army Material Command Deputy Chief of Staff for Research, Development and Acquisition is credited with the formation of BTIC. BTIC was created to meet the perceived acquisition and training requirements for operations such as Operation Joint Endeavor. Discussions with Lieutenant Colonel Kevin House, U.S. Army, Head of the QRO, and with Mr. Mike Agogino, a contract supporter of the QRO, on February 10, 1998.

¹³³ Headquarters, U.S. Army Material Command, Bosnia Technology Integration Cell Newsletter (BTIC) 1 (Issue No. 4 November 1997). The QRO may be reached by telephone at (703) 617-5756 or DSN 767-5756. Information regarding the QRO may also be found on the internet at website <http://amc.citi.net/amc/qro>.

¹³⁴ An emergency acquisition of material or training may be triggered by an urgent need, such as an emergent operation where U.S. forces will be placed in harm's way. Once the urgency requirement has been met, the QRO goes into high gear to obtain the requested material or training. Discussion with Lieutenant Colonel Kevin House, U.S. Army, Head of the QRO on February 10, 1998.

¹³⁵ AN ANTHOLOGY OF MILITARY QUOTATIONS 246 (Michael Dewar ed., 1990) [hereinafter *Military Quotations*].

¹³⁶ DoD Dir. 3000.3, *supra* note 9, at 3. See also footnote 9. An effort is underway to create a document which will provide multiservice tactics, techniques and procedures for the tactical use of non-lethal weapons. The second draft of this document still needs a great deal of work to flesh out the actual tactics, techniques and procedures to be employed. See Second Draft, Multiservice Tactics, Techniques, and Procedures For the Tactical Employment of Non-Lethal Weapons (Air, Land and Sea Application Center June 12, 1997) (copy on file with the author).

In the future, training with non-lethal weapons may be considered routine, but at this time it presents a unique challenge. A part of this challenge is reaching the same level of proficiency with non-lethal weapon systems that exists for lethal weapon systems. To accomplish this training goal will be one of the commander's most difficult responsibilities. Proper instruction and practice are the cornerstones to operational success, and commanders must work their way through the training process. There is no short cut. Unit readiness requires the unit which will use a non-lethal weapon to train with that system.

The training aspect of the non-lethal weapon equation can be lengthy and costly. In most cases, both the military units and the instructors will have, at best, only limited experience with the system. Furthermore, developing the appropriate training package will take time. In fact, most training packages will be the result of trial and error to discover what works well and what does not. Commanders can expect the overall training time for their units to increase in direct proportion to the time needed to train for the use of the non-lethal weapon system. This increase simply reflects the reality that the unit must go through the standard lethal weapon system training as well as the new non-lethal weapon system training.

The training program for each non-lethal weapon system should consist of two parts: one part which covers general training matters¹³⁷ for all members of the unit and the second part, a more intense training package for the specific members who will actually employ the system. The instruction contained within this intense training package should include the following:

- the function and inner workings of the weapon system¹³⁸
- tactics, techniques and planning considerations for the system¹³⁹
- special equipment, transportation or support required for its use¹⁴⁰
- training directed toward a specific mission capability¹⁴¹

¹³⁷ The general training package should provide all members of the unit with important safety information to include any special first aid or emergency medical care for accidents involving the non-lethal weapon system to be used.

¹³⁸ Those members who will operate a non-lethal weapon system must understand how the system works. Without a basic understanding of its functions and its capabilities, the operators will not be able to properly use the weapon system.

¹³⁹ As with all weapon systems, the tactics, techniques and planning considerations will change or be modified as the experience factor with the weapon system increases. The focus of this part of the instruction should be on the tactical use of the weapon system on the battlefield. In addition, as information becomes available, the training should be expanded to cover the planning for potential vulnerabilities or countermeasures which might be used against it and interoperability problems with other weapon systems. Also, training should be provided on the possible environmental effects of the system.

¹⁴⁰ From a logistical perspective, all equipment required for the use and movement of the weapon system must be understood. For example, during this portion of the training, instruction might be provided about special medical support units that should be deployed to handle medical problems created by the weapon system.

- actual practice using the system¹⁴²
- the normal malfunctions or break points for the system¹⁴³
- maintenance, repair procedures and points of contact for technical information about the system and for ordering or obtaining spare parts¹⁴⁴
- advanced training for the officers and staff noncommissioned officers who will be in charge or control of the weapon system

General Zinni's staff worked extremely hard to create a military training program for the non-lethal weapons selected for use during Operation United Shield. As a starting point, his staff looked at the training used by the local police and other law enforcement agencies. Since crowd control was the sub-category capability for which the non-lethal weapons for this operation were used, the training concentrated on the types of crowds or mobs, psychological factors relating to crowds and mobs, tactics for dismounted Marines, force multiplying tactics, and the process of rapid decision making.¹⁴⁵

Using the training program prepared for Operation United Shield as a starting point, the I MEF, Special Operation Training Group (SOTG) worked with Army military police at Fort McClellan, Alabama to build a standard predeployment non-lethal weapons program of instruction (POI) for the capability of crowd control. This POI was approved by the Marine Corps, and in May 1996, a special Non-lethal Weapons Mobile Training Team was assembled to provide training on this POI to all the MEU instructors in I MEF and II MEF.¹⁴⁶ Each MEU in I MEF and II MEF now utilizes this POI as a

¹⁴¹ The non-lethal weapon training package should be tailored to meet the specific capability requirements of the expressed or implied taskings within the assigned mission.

¹⁴² As a mandatory part of the training program, all military members who will use the weapon system should be required to practice under an instructor's supervision. Included within this practical exercise should be training on the standard operating procedure (SOP) for each weapon system, training on safety concerns and a graduation test requiring operation of the system under simulated battlefield conditions.

¹⁴³ To facilitate expeditionary operations, the sustainment of the non-lethal weapon system will be critical. For this reason, those military members actually using the system need the knowledge and ability to handle all the common problems that occur with the weapon system. They must also be trained to repair the system in case of malfunction, breakage or the need to replace a worn component part.

¹⁴⁴ The training must provide instruction on the routine preventive maintenance cycle because regular preventive action may avoid potential problems and keep the system from requiring major repairs. As with all the unit's equipment, there must be a supply block for the spare parts for such repairs.

¹⁴⁵ Colonel Lorenz, *supra* note 2, at 74. In terms of training time, the typical training day for the Marines deployed for Operation United Shield was 10-12 hours for enlisted and 14-17 hours for officers. *Id.*

¹⁴⁶ The purpose for this training was to certify the I MEF and II MEF MEU attendees as non-lethal instructors for this POI. Discussions with Captain Vernon L. Graham, U.S. Marine Corps, SOTG, I MEF Trainer, on February 9, 1998, and with Captain Stephen Simpson, U.S. Marine Corps, on February 12, 1998. Captain Simpson is the Operations Officer to the U.S. Army's Basic Military Police Training Division at the U.S. Army Military Police School, Fort

part of their special training.¹⁴⁷ A standardized deployment kit containing non-lethal weapons for use by the MEUs was developed as part of the POI.¹⁴⁸ The original POI consisted of 119.5 hours of instruction. The POI was divided into 41 hours of lecture, 55.5 hours for practical exercise 1, 18 hours for practical exercise 2, and 5 hours for tests.¹⁴⁹ All together this POI takes about 10 days. In addition, the special Non-lethal Weapons Mobile Training Team has used this POI to train and certify non-lethal weapon instructors for the U.S. Support Group in Haiti and the Army's 5th Corps.¹⁵⁰

Although a solid training package for the use of non-lethal weapons for crowd control has been developed, no comparable training packages exist for other capabilities. This represents a significant obstacle, and it could provide commanders with a rationale for employing non-lethal systems only for crowd control. To avoid this problem, training packages for the use of non-lethal weapon systems for capabilities other than crowd control must be developed. The Commandant of the Marine Corps, as the Executive Agent for the Department of Defense Non-lethal Weapons Program, is attacking this problem through joint working groups. The success of these groups will be judged by their ability to organize, coordinate, and stimulate the development of standardized training programs.

If the rapid expansion of complex non-lethal weapon systems continues, it could dictate a need for reorganization within the military services. One potential change might be the requirement for more detailed and expansive training on many different types non-lethal weapon systems in order to provide commanders with the in-house expertise needed for a variety of

McClellan, Alabama. On June 12, 1998, the CG, MCCDC formally approved a course called the Non-Lethal Individual Weapons Instructor Course (NIWIC). The NIWIC is a "train the trainer" course which last 10 days given at the Marine Corps Detachment at Fort McClellan, Alabama.

¹⁴⁷ Discussions with Captain Vernon L. Graham, U.S. Marine Corps, SOTG, I MEF Trainer, on February 9, 1998.

¹⁴⁸ The standard Non-lethal Weapon Kit for each MEU in I MEF includes the following: 200 Riot Face Shields; 40 Full-length Riot Shields, Transparent; 200 Expandable Riot Batons w/Holster; 2 Riot Baton Training Suits; 12 Training Riot Batons; 13 Portable Bullhorns; 3 High Intensity Xenon Searchlights; 200 Disposable, Double, Restraining Wrist/Forearm/Ankle Cuffs; 27 Buttcuffs; 1250 Caltrops; 400 Inert Individual OC Canisters; 120 Inert Team OC Canisters, (MK9); 18 Inert High Volume Output, High Capacity OC Canisters; 81 - 25 RD 12 GA Shell Pouches; 162 - 40 MM Carrying Pouches; and 162 Sting Ball Grenade/Flash Bang Pouches. *Id.*

¹⁴⁹ Discussion with Captain Stephen Simpson, U.S. Marine Corps, on February 12, 1998. See also the I MEF, SOTG Non-Lethal Weapons Training Course Schedule for May 31, 1997. Colonel Gary Ohls, U.S. Marine Corps Reserve, personal letter of October 29, 1997, discussing the MEU training on non-lethal weapon systems. See also SOTG, I MEF training information received by FAX on February 9, 1998, from Captain Vernon L. Graham, U.S. Marine Corps (on file with the author).

¹⁵⁰ Discussion with Captain Stephen Simpson, U.S. Marine Corps, on February 12, 1998. Two partial POI training periods were provided to the U.S. Support Group in Haiti. The first involved the 82nd Airborne Command in September 1996, and the second involved 2d Tank Battalion, 2d Marine Division in March 1997. The POI training for the Army's 5th Corps took place in Germany in November 1997. *Id.*

capabilities. Accomplishing this detailed training may require the military services to establish a non-lethal weapon military occupational specialty (MOS).¹⁵¹ Military personnel having a primary or secondary MOS in non-lethal weapons would become the principal advisors to the commander concerning the selection, training and application of these weapon systems. This would be welcomed by most commanders in view of the difficulties discussed earlier in obtaining and organizing the necessary information. In addition, having military personnel with a non-lethal weapons MOS would probably make commanders more inclined to use and train with non-lethal weapons during exercises, thereby causing an overall increase in their unit's proficiency regarding those systems. Another benefit would be the opportunity to cross-train other military personnel within the unit.

The military services must also examine how best to ensure that non-lethal weapons will be not be overlooked but included in all operational planning. If these systems are not considered in the early stages of planning, the commander may not receive the best recommendations on the potential courses of action to accomplish the mission. Additionally, the use of non-lethal weapons must be integrated into the targeting process. This may require the internal staff functions of the operations directorate to be reorganized to allow for the creation of a non-lethal weapons cell within the fires coordination unit. Members of this cell would become vital to the targeting analysis board. Without some type of reorganization, the staff preparing the means of striking future targets is less likely to consider the application of non-lethal systems.

V. Employing Non-lethal Weapon Systems

Because non-lethal weapon systems have broad application across the entire spectrum of conflict, they may be used for all military operations and will, without doubt, contribute to success in future armed conflicts. During armed conflict, battlefields may be shaped through operations which employ non-lethal weapons. Non-lethal weapons may be used in tactical targeting to fight the close battle; in strategic targeting to fight the deep battle; in an urban environment where lethal indirect fire weapons may be impractical; as a force multiplier for rear area security by enhancing barriers to bases, supply depots, and other command locations; and as a tool to manage and control EPWs, civilian internees, and refugees.

¹⁵¹ The term "MOS" has been selected to refer to the specialized training conducted by the military services for their officers and enlisted personnel. In each military service, different terms have developed to reflect this specialty training. For example, the Marine Corps uses "MOS" for both its enlisted and officers; the Army uses "MOS" for its enlisted but its officers are assigned to "branches" (such as, armor, air defense artillery, aviation, chemical, field artillery, infantry, military intelligence, engineer, etc.) and receive secondary specialties; the Air Force uses the term "Air Force specialty code" (AFSC) for both its enlisted and officers; and the Navy uses the term "rates" with a "Navy enlisted classification" (NEC) for the sub-specialty training for its enlisted, and "designators" (such as surface warfare, air warfare, submarine warfare, civil engineer, etc.) for its officers and later (upon completion of appropriate schooling and billet assignments in that specialty) receive what is called a "proven specialty" (P code).

With the demise of the former Soviet Union, the likelihood of a global war has diminished substantially. Now, the most likely use of a non-lethal weapon system will come during a military operation other than war (MOOTW).¹⁵² One must remember a MOOTW is not always conducted under peaceful circumstances. World hot spots resulting from cultural or ethnic unrest, armed insurgencies, religious disputes, and unstable political leadership often precipitate a MOOTW. Frequently, the most difficult aspect of a MOOTW is to provide humanitarian assistance and protection to the omnipresent civilians in volatile and unpredictable surroundings. When lethal force instead of non-lethal force is used by those who have come in the name of "humanity," the complexion of the situation changes. The forces providing aid may no longer be viewed as friends and allies but instead as oppressors and aggressors. Without non-lethal weapons to expand the options available on the low side of the use of force continuum, the commander faces the dilemma of doing nothing or using lethal force. Non-lethal weapons may be used to fill the gap between diplomatic pressure, economic sanctions or a military show of force and the use of lethal force.

For the United States, a MOOTW has become a common means of responding to a world crisis. For example, when Libya confronted the United States indirectly in the Gulf of Sidra,¹⁵³ the United States responded through a type of MOOTW known as a "freedom of navigation operation." MOOTWs have been used to respond to a loss of government control and internal violence

¹⁵² A military operation other than war (MOOTW) is also frequently referred to as an operation other than war (OOTW). The term MOOTW has been defined as encompassing different types of activities to include peace type operations, as well as a wide range of non-traditional operations "where the military instrument of national power is used for purposes other than the large-scale combat operations usually associated with war." JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, DOCTRINE FOR JOINT OPERATIONS V-1 (FEBRUARY 1, 1995). Joint Doctrine sets forth 16 different types of MOOTWs: Support to Insurgency, Strikes and Raids, Show of Force Operations, Recovery Operations, Protection of Shipping, Peace Operations, Noncombatant Evacuation Operations, Nation Assistance or Support to Counterinsurgency, Military Support to Civil Authorities, Humanitarian Assistance, Ensuring Freedom of Navigation and Overflight, Enforcing Exclusion Zones, Enforcement of Sanction/Maritime Intercept Operations, DoD Support to Counterdrug Operations, Combating Terrorism, and Arms Control. JOINT CHIEFS OF STAFF, JOINT PUB. 3-07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR III-1 (JUNE 16, 1995). The U.S. Army definition for an OOTW is found in U.S. DEP'T ARMY, FIELD MANUAL 100-5, *Operations* 2-0 (June 1993). In the following quote, General Charles C. Krulak, Commandant of the U.S. Marine Corps, implies that MOOTWs are the most likely type of conflict on the horizon: "Future war is most likely not the son of Desert Storm; rather it will be the stepchild of Somalia and Chechnya." Robert Holzer, *Krulak Warns of Overreliance on Technology*, Defense News, October 7-13, 1996 at 4, 32.

¹⁵³ This confrontation between the United States and Libya occurred as the result of Libya's claim to the Gulf of Sidra as "historic waters." The United States asserted that Libya's claim violated international law and documented this objection by diplomatic protest and by conducting a number of naval exercises (freedom of navigation operations) in the Gulf of Sidra. Mark J. Valencia, *Law of the Sea in Transition: Navigation Nightmare for the Maritime Powers?*, 18 J. Mar. L. & Com. 541 (October 1987).

through "noncombatant evacuation operations."¹⁵⁴ The U.S. military is currently conducting a type of MOOTW known as a "peace enforcement operation" in the former Yugoslavia.¹⁵⁵ In addition, the U.S. military has conducted MOOTWs to provide humanitarian assistance in response to domestic and foreign disasters¹⁵⁶ and to restore democracy.¹⁵⁷

Although the employment of non-lethal weapon systems may be similar from one operation to the next, certain key elements within the process will change based on the mission and the threat level. The most important of these elements, the tactics for utilizing non-lethal weapons and the rules of engagement (ROE), are closely entwined with the expressed and implied taskings of the mission and the political policy upon which the mission is grounded. There are two potential problems that could have a tremendous impact upon the tactics for employing non-lethal weapons and the ROE. The first is "mission creep,"¹⁵⁸ and the second is a change to the threat level. If there is a change to the mission (through mission creep or otherwise) or to the threat level, a totally different operation may result. Faced with a change to the mission or to the threat level, a commander must go back to the drawing board to determine whether modifications are needed to the make-up of the military force, to the lethal and non-lethal weapon systems selected (to include reviewing the tactical plan for employing weapon systems) and to the ROE for mission accomplishment.

¹⁵⁴ For an excellent discussion of the legal underpinning for a noncombatant evacuation operation see Major Steven F. Day, *Legal Considerations in Noncombatant Evacuation Operations*, 40 *Naval Law Review* 45 (1992).

¹⁵⁵ U. S. military forces are serving in the NATO controlled "Stabilization Force" (SFOR) formerly known as the "Implementation Force" (IFOR) currently being used in the former Yugoslavia. This ongoing military operation is a Chapter VII peace enforcement operation that was mandated by the United Nations in 1995. S.C. Res. 1031 (Dec. 15, 1995), U.N. Doc. S/RES/1031 (1995). For a comprehensive article on the disintegration of the former Yugoslavia see *The Balkan Survey*, *The Economist*, January 24, 1998 at 54-55. The general framework for peace in Bosnia and Herzegovina is set forth in the Dayton Peace Accords and the Annexes thereto. See U.N. Doc. S/1995/999, Annex. For more information on the United Nations involvement in the former Yugoslavia see S.C. Res. 743 (Feb. 21, 1992), U.N. Doc. S/RES/743 (1992); S.C. Res. 757 (May 30, 1992), U.N. Doc. S/RES/757 (1992); and S.C. Res. 836 (June 4, 1993), U.N. Doc. S/RES/836 (1993).

¹⁵⁶ Operation Sea Angel was a foreign disaster relief operation conducted by the United States after a typhoon struck the coast of Bangladesh in May of 1991. See Memorandum of Understanding Between Government of the Peoples Republic of Bangladesh and the United States to Specify the Legal Status of the United States Pacific Command Disaster Relief Task Force May 20, 1991.

¹⁵⁷ Operation Just Cause is an example of a unique MOOTW conducted by the U.S. military to restore democracy in Panama and to remove from power General Manuel Antonio Noriega who was involved in drug trafficking. For more information about Operation Just Cause see Martin C. Arostegui, *Twilight Warriors: Inside the World's Special Forces* 276-297 (1997).

¹⁵⁸ Mission creep is a term used to describe a change to the original mission after the operation has begun. For a discussion of mission creep see *Operations Other Than War*, *supra* note 13, at 32-34.

A. Tactics For the Employment of Non-lethal Weapons

The development of the techniques and methods for utilizing non-lethal weapon systems is in its infancy. Commanders should not view the employment of non-lethal weapons as a panacea, but instead as a dual edged sword. On the positive side, the utilization of non-lethal weapons provide the commander with exciting new force options and capabilities; however, on the negative side, they create difficult employment problems. To overcome these problems, commanders must draw upon the abilities of their staffs and their own prior experience, education and skill to create a sound tactical operation plan which allows the advantages of the non-lethal capabilities to be exploited while at the same time minimizing the danger to the force. As always, careful preparation and planning are the key. As stated by Ferdinand Foch:

I don't believe in [genius]. A battle is a complicated operation, that you prepare laboriously. If the enemy does this, you say to yourself I will do that. If such and such happens, these are the steps I shall take to meet it. You think out every possible development and decide on the way to deal with the situation created. One of these developments occurs; you put your plan in operation, and everyone says, 'What genius . . .' whereas the credit is really due to the lab[or] of preparation.¹⁵⁹

Four potential options have been suggested by Nick Lewer and Steven Schofield as military force structures for employing non-lethal weapon systems. Those are:

1. a military force equipped only with non-lethal weapons
2. a military force equipped with non-lethal weapons and lethal weapons systems for self-defense only
3. a force consisting of two units: the first with non-lethal weapon systems only, the second held in close reserve and equipped with lethal weapon systems to be deployed if required
4. a force with fully integrated lethal (defensive and offensive) weapons and non-lethal weapons.¹⁶⁰

¹⁵⁹ From Ferdinand Foch's interview in April 1919 cited in *Military Quotations*, *supra* note 135, at 172.

It is apparent that 2, 3, and 4 are closely related since all three propose the use of non-lethal with lethal weapon systems. From a commander's viewpoint, these four structures may be synthesized into two tactical methods for employing non-lethal weapons: their use as stand-alone systems, and their use in conjunction with lethal systems.

1. Non-lethal Weapons As Stand-Alone Systems

The Department of Defense has consistently viewed the use of non-lethal weapons as a means of enhancing the military effectiveness of lethal weapon systems.¹⁶¹ This is reflected in the new Department of Defense non-lethal weapons policy which states "[n]on-lethal weapons may be used in conjunction with lethal weapon systems to enhance the latter's effectiveness and efficiency in military operations. This shall apply across the range of military operations to include those situations where overwhelming force is employed."¹⁶² Although this policy stops short of specifically prohibiting the use of a non-lethal weapon as a stand-alone system, it has caused commanders to shy away from this type of use. In light of the Department of Defense non-lethal weapons policy, the question becomes: should non-lethal systems be used solely as a means to enhance lethal weapon systems? The answer to this question is a qualified no. The use of non-lethal weapons only in conjunction with lethal weapons dramatically impacts upon the commander's flexibility. This does not mean non-lethal weapons should always be used as stand-alone weapon systems. In fact, the tactical decision about whether to employ a non-lethal weapon system in isolation should be made by the on-scene commander, and only after all the information available regarding the mission, threat level, and operational environment have been evaluated.

At this point, it is well to emphasize that "[t]he availability of non-lethal weapons shall not limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense."¹⁶³ This guidance, which restates the fundamental self-defense

¹⁶⁰ Lewer and Schofield, *supra* note 13, at 118-119.

¹⁶¹ For information on the Department of Defense concept for non-lethal weapons see Barry ET AL., *supra* note 6, at 9 and the *Joint Concept for Non-lethal Weapons* produced at the direction of the Commandant of the Marine Corps by the Joint Non-Lethal Weapons Directorate, dated January 5, 1998 at 6. Some feel strongly that non-lethal weapon systems should never be used as stand-alone systems. They argue that if the situation requires the deployment of U.S. military forces, a need for lethal force in self-defense is by definition foreseeable. See also David B. Kirkwood, *Non-lethal Weapons In Military Operations Other Than War* 6 (June 14, 1996) (unpublished manuscript on file at the library of the Naval War College, Newport, Rhode Island) and David C. Morrison, *More-Than-Lethal Weapons*, *National Journal*, July 22, 1995 at 1919.

¹⁶² DoD Directive 3000.3, *supra* note 9, at 2.

¹⁶³ *Id.* Non-lethal weapons provide additional use of force options which are not intended to diminish or replace lethal capabilities for self-defense or mission accomplishment. In effect, there is no obligation for a commander to employ non-lethal weapons rather than lethal weapons as a response in self-defense (to a hostile act or a demonstration of hostile intent) or for mission

principle contained in the Chairman, Joint Chiefs of Staff Standing Rules of Engagement,¹⁶⁴ is critical for it reminds commanders that they not only have the inherent authority but also the responsibility to ensure their commands and other U.S. military forces in the vicinity are properly defended. These self-defense responsibilities will play a major part in determining whether (for a certain mission, a certain threat level and a certain operational environment) the use of a non-lethal weapon system as a stand-alone weapon is appropriate.

Good intelligence concerning the expected military and civilian opposition to be encountered is a primary element in determining whether it is appropriate to use a non-lethal system as a stand-alone weapon. Non-lethal weapon systems should never be used as stand-alone weapons in operations where opposition forces have been declared hostile, the threat level is high, or the mission involves a region of the world where armed conflict has just ended, is continuing, or is about to start. With these exclusions, the window of opportunity for the use of non-lethal systems as stand-alone weapons is significantly narrowed to only a peacetime MOOTW which involves disaster relief or humanitarian assistance. In sum, non-lethal weapon systems should rarely, if ever, be employed as stand-alone weapon systems.

2. Non-lethal Weapons in Conjunction With Lethal Weapon Systems

The most common and logical method for employing non-lethal weapon systems is in conjunction with lethal weapons. This provides several advantages. One is the overall synergistic effect on the operation. Another advantage is the ability to use a level of force below lethal force while retaining the necessary capability to provide for unit self-defense.¹⁶⁵

However, using these weapon systems in combination presents one very difficult problem. That problem involves developing a tactical plan that allows for the employment of a non-lethal weapon system prior to the use of a lethal weapon system. Such a plan presents a unique challenge since it not only requires a priority in weapon system usage but also requires the flexibility to permit a gradual or dramatic increase in force when necessary in self-defense or for mission accomplishment. One tactic for ensuring adequate self-defense for those U.S. military members who will be utilizing a non-lethal weapon system is to provide lethal cover. In the past, this has been accomplished by placing snipers with communication assets in key overlook positions, a tactic

accomplishment. During an interview, the Assistant Secretary of Defense, H. Allen Holmes, indicated that U.S. military forces would always have the option of using lethal force in self-defense. *Warfighter's Want Weapons that Disable But Don't Kill*, National Defense, July/August 1996 at 24.

¹⁶⁴ Chairman, Joint Chiefs of Staff Instr. 3121.01, *Standing Rules of Engagement for US Forces* (October 1, 1994) [hereinafter STANDING RULES OF ENGAGEMENT].

¹⁶⁵ See DoD Dir. 3000.3, *supra* note 9, at 2 and National Defense, *supra* note 163, at 24.

used by General Zinni during Operation United Shield. In Somalia, Marines using non-lethal weapon systems were under constant observation and in constant communication with Marines employing lethal weapon systems. General Zinni trained his force so that the transition from a non-lethal level of force to a lethal level of force could be made swiftly and efficiently.¹⁶⁶

Non-lethal weapons when used in conjunction with lethal weapon systems greatly improve the perimeter security or defensive security for United States embassies, military bases and forward deployed operational forces. Two concerns which arise when using non-lethal weapons with lethal weapons for defensive security are predictability in regard to the order of employment among the several non-lethal and lethal weapons being used and whether it is advantageous to use non-lethal weapon systems in an overt manner, a covert manner, or both. To avoid predictability, the commander may desire to fluctuate the use of certain non-lethal and lethal systems within his defensive perimeter. In addition, it is important to note that both of these concerns are influenced by the degree of coordination within the command. To achieve the maximum effectiveness for those non-lethal weapon systems employed with lethal weapon systems, they must be deployed as part of a coordinated effort by the military forces of the joint or combined operation.¹⁶⁷

The employment of non-lethal weapons in conjunction with lethal weapon systems can dramatically improve the offensive capabilities of a commander's unit. Since non-lethal weapons may be utilized as "battlespace effectors,"¹⁶⁸ they offer commanders excellent tools to dominate future battlefields by allowing them to shape and control the battlespace, by enhancing their ability to maneuver their forces to a position of advantage and by improving their flexibility through increased options. Certain non-lethal systems when used with lethal systems can become force multipliers which can temporarily disable some or all of the adversary's personnel or literally stop the adversary's jeeps, trucks and armor in their tracks.¹⁶⁹ With the ability to influence the conflict as described above, the commander could bring about the swift capitulation and surrender of an adversary's forces.

For controlling volatile crowds or mobs, the tactic of using lethal cover works well. By placing observers with lethal weapon systems in strategic locations, professional agitators,¹⁷⁰

¹⁶⁶ See General Zinni's interview on the 60 Minutes: CBS television broadcast, *supra* note 5.

¹⁶⁷ Lewer and Schofield, *supra* note 13, at 57.

¹⁶⁸ For a discussion of "battlespace effectors" see Williams, *supra* note 35.

¹⁶⁹ Currently, non-lethal technology is being developed to stop motor vehicles through microwaves or high powered acoustics. Michael Raphael, *Stop That Tank, But Don't Destroy It*, Philadelphia Inquirer, November 22, 1997 at D10. See also 60 Minutes: CBS television broadcast, *supra* note 5.

mob leaders¹⁷¹ or activists¹⁷² may be identified, photographed and kept under careful scrutiny while non-lethal means are applied to disperse or subdue the crowd. If lethal force is employed against those applying non-lethal force, the covering unit may be used to detain or capture the individuals responsible for the acts of violence, or, if necessary, employ lethal force to eliminate the threat.

B. ROE For Non-lethal Weapons

For U.S. military forces, the term ROE is defined as “[r]ules which delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.”¹⁷³ The current instruction providing guidance to U.S. military commanders on the use of force is the Standing Rules of Engagement.¹⁷⁴ This replaced the JCS Peacetime Rules of Engagement on October 1, 1994¹⁷⁵ and established the fundamental procedures and policies for U.S. military commanders to follow during all military conflicts, contingencies and operations.¹⁷⁶ The Standing Rules of Engagement are designed to assist the commander in crafting the ROE needed for mission accomplishment and to provide direction on the use of force for the safety and survival of the commander’s unit and other U.S. forces in the vicinity (self-defense).¹⁷⁷ The ROE also represent one of the most effective means of implementing the strategic decisions made by higher headquarters.

Developing the ROE for an operation is not easy, and where the use of non-lethal weapons is planned, it is even more complicated. Since the process for preparing the ROE for different types of operations is similar, this discussion will concentrate on drafting the ROE for the use of non-lethal

¹⁷⁰ Professional agitators are individuals who in a calculated and deliberate manner build up the emotional tension within the mob and use the mob to achieve a specific fixed objective. Usually, they will employ stooges or subordinate leaders to shout agreement with statements they make justifying a suggested mob action. Raymond M. Momboisse, *Confrontations, Riots and Urban Warfare* 7 (1969).

¹⁷¹ Mob leaders focus, guide, control, and incite the crowd concerning a specific incident so that possible violent action will be taken. *Id.*

¹⁷² Activists are vocal minorities supporting the agitator. They are normally short tempered hotheads whose ultimate objective is to incite others to violence. *Id.*

¹⁷³ JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, *Department of Defense Dictionary of Military and Associated Terms*, 329 (March 23, 1994).

¹⁷⁴ *Standing Rules of Engagement*, *supra* note 164.

¹⁷⁵ *Id.* at 1. The Peacetime Rules of Engagement for U.S. Forces were promulgated by a Memorandum of the Secretary of the Joint Staff, October 28, 1988. PEACETIME RULES OF ENGAGEMENT FOR U.S. FORCES (October 28, 1988).

¹⁷⁶ *Standing Rules of Engagement*, *supra* note 164, at A-1.

¹⁷⁷ *Id.*

weapons for a joint task force (JTF). Crafting the ROE demands attention to detail, an understanding of the bases for the ROE and a firm grasp of the process.

1. What Are the Bases For the ROE?

Understanding the fundamental bases for the ROE is essential to the crafter of the ROE. Each basis is unique and, when integrated into the ROE development process, helps shape the application of military force. There are three fundamental bases for the United States' ROE: national policy, operational requirements and the law.¹⁷⁸ It is upon the intersection of these three bases that the ROE are built.

a. National Policy

Of the three bases, national policy may be the hardest to articulate. National policy is often referred to as a political objective. As this quote from Carl von Clausewitz indicates, the use of military force is simply the means of reaching a political objective:

[W]ar is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means. What remains peculiar to war is simply the peculiar nature of its means. War in general, and the commander in any specific instance, is entitled to require that the trend and designs of policy shall not be inconsistent with these means. That, of course, is no small demand; but however much it may affect political aims in a given case, it will never do more than modify them. The political object is the goal, war is the means of reaching it and means can never be considered in isolation from their purpose.¹⁷⁹

The political object mentioned by Clausewitz is simply another term for foreign policy. Therefore, an understanding of the United States' foreign policy and the ramifications of that foreign policy for the military operation is very important to the crafter of the ROE. Usually, the foreign policy goals or national political objectives will be stated in the guidance received from a

¹⁷⁸ For a discussion of the ROE bases see Professor Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocates Primer*, 42 A.F. L. Rev. 247 (1997) and Captain J. Ashley Roach, JAGC, USN, *The Rules of Engagement*, Naval War College Review 47-48 (January/February 1983).

¹⁷⁹ Carl von Clausewitz, *On War* 87 (Michael Howard and Peter Paret eds., 1984).

higher service headquarters or from the CINC within whose area of responsibility the operation will take place.¹⁸⁰ In short, the ROE must be consistent with the United States' foreign policy objectives, and this is only possible if those objectives are clearly understood.

The goal of the national security policy of the United States is "to maintain a stable international environment compatible with U.S. national security interest."¹⁸¹ To support this policy, the United States has formulated a global objective of deterring armed attack against its interest. For effective deterrence, one must have the ability to fight at any level of conflict.¹⁸² The availability of non-lethal weapons has significantly increased the United States' capability to do this. If deterrence fails, the national policy of the United States permits responses that: "(1) [a]re proportional to the provocation; (2) [a]re designed to limit the scope and intensity of the conflict; (3) [w]ill discourage escalation; and (4) [w]ill achieve political and military objectives."¹⁸³ In all four of these options, non-lethal weapons may provide the commander with the means of responding to the crisis short of resorting to lethal force.

b. Operational Requirements

Within the JTF staff, the primary generator of operational matters is the operations directorate or J-3.¹⁸⁴ Normally, the operational requirements mirror the specific planning concepts that the staff has developed regarding unit security and the express and implied taskings contained within the mission.

¹⁸⁰ Each CINC receives guidance on foreign policy objectives for his area of responsibility from the National Command Authorities (NCA). For the United States, the President has the overall responsibility to establish and implement foreign policy. U.S. Const. art. II. In addition, the President is the Commander in Chief of the U.S. armed forces. *Id.* The U.S. Congress also has a constitutional role involving the armed forces. Article I section 8 of the U.S. Constitution provides in part: "Congress shall have the power . . . [t]o raise and support Armies . . . ; [t]o provide and maintain a Navy; [and] [t]o make Rules for the Government and Regulation of land and naval forces." The ROE provide a means for the civilian leadership of the United States to exercise control over the use of force by the U.S. military.

¹⁸¹ STANDING RULES OF ENGAGEMENT, *supra* note 164, at A-3.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ The J-3 is one of the standard directorates of a staff provided to the JTF commander to assist in the decision making and execution process for an assigned mission. Other standard JTF directorates would include the J-1 (Manpower and Personnel), the J-2 (Intelligence), the J-4 (Logistics), the J-5 (Plans and Policy), and the J-6 (Command, Control, Communications and Computer (C4) Systems). In addition, the JTF staff will have special staff groups who will "furnish technical, administrative, and tactical advice and recommendations to the Commander and other staff officers." The Joint Chiefs of Staff, Joint Pub. 0-2, UNIFIED ACTION ARMED FORCES (UNAAF) IV-12-IV-14 (February 24, 1995). Examples of special staff groups are: the Staff Judge Advocate, the Medical Officer, the Dental Officer, Comptroller, and the Public Affairs Officer. The sole function of staff members of the several directorates and the special staff groups is to support the commander. Staff members have only the authority delegated to them by the commander. *Id.* at IV-12.

Operational concerns usually focus on the following planning activities: mobilization, employment, sustainment, redeployment of the military force, and rules of engagement. If the mission changes, the operational concerns must be re-examined and changed when necessary. When the mission is confusing or unclear, commanders must seek clarification, because the ROE cannot be drafted without a clear understanding of the operational requirements for the mission. The J-3 must also be aware of the specific characteristics of the weapon systems to be used for the mission. This is particularly important for non-lethal systems which may be unique and require specially drafted supplemental ROE measures to ensure proper usage on the battlefield.

c. The Law

The third basis for the ROE is the law. Under this basis, the focus is on the tenets of United States domestic law¹⁸⁵ and the obligations of the United States under international law, generally the law of armed conflict.¹⁸⁶ The law of armed conflict has been defined as "that part of international law that regulates the conduct of armed hostilities."¹⁸⁷ It includes applicable treaty law as well as customary international law.¹⁸⁸ The law of armed conflict is viewed as being permissive in nature. This means, if the practice being questioned is not prohibited under either customary international law or by treaty, it is permitted.

¹⁸⁵ The domestic law of the United States includes the U.S. Constitution, federal statutes and regulations, court decisions, and common law.

¹⁸⁶ The U.S. Constitution Article VI, Clause 2 states in part that "[t]his constitution, and the laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land[.]" Under this provision of the U.S. Constitution, the law of armed conflict has been made a part of United States law which every servicemember has a duty to obey. Although several major bodies of law, such as the law of the sea, the law of neutrality and the law of armed conflict, are part of the larger body of international law and might be applicable to the preparation of the ROE, the focus for this paper will be limited solely to the law of armed conflict. To ensure compliance with the law of armed conflict by the U.S. armed forces, the Department of Defense Law of War Program was implemented. U.S. DEP'T OF DEFENSE DIR. 5100.77, DOD LAW OF WAR PROGRAM (July 10, 1979). Violations of the law of armed conflict by U.S. military members will be prosecuted under the Uniform Code of Military Justice. Paragraph 4.a of SECNAVINST 3300.1A states "the [Department of the Navy] will comply with the law of armed conflict in the conduct of military operations and related activities in armed conflicts."

¹⁸⁷ DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, *supra* note 173, at 215.

¹⁸⁸ Customary international law has become a part of the national law of the United States. The Supreme Court of the United States ruled in the renowned case, *The Paquete Habana*, in the absence of applicable treaty law or a controlling legislative statute, executive regulation or judicial precedent, that customary international law is to be followed. *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 299 (1900). See also 1 Restatement (Third), sec 111, Reporter's Notes 2 and 3 and Introductory Note. "The customary international law of armed conflict derives from the practice of military and naval forces in the field, at sea and in the air during hostilities." U.S. DEP'T OF NAVY ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M/MCWP 5.2.1/COMDTPUB P5800.1, 5-8 (15 November 1997) [hereinafter ANNOTATED SUPPLEMENT].

All legal issues surrounding each operation must be examined to ensure that the ROE, when drafted, will comply with the domestic law of the United States and the law of armed conflict. Some principles of the law of armed conflict are harder to apply than others. Two of the most difficult are necessity and proportionality. For the ROE, these principles play a critical role in determining when and how much force should be used for both mission accomplishment and self-defense.

2. Responsibility To Craft the ROE

The staff section within the JTF which has the primary responsibility to craft the ROE is the operations directorate (J-3).¹⁸⁹ This does not mean that the J-3 should draft the ROE in a vacuum. To develop ROE that are appropriate to the mission and the threat requires cooperative interaction among the various staff sections of the command. One way to generate this interaction is through the establishment of an ROE cell.¹⁹⁰ Since responsibility for the ROE rests with the J-3, the head of the ROE cell should be the J-3 or a J-3 deputy. Other members should include the intelligence directorate (J-2), the Staff Judge Advocate, the future plans directorate (J-5) and specialists, such as an engineer from the logistics directorate (J-4).¹⁹¹ The ROE cell works best during the deliberate planning cycle for a contingency. It is less effective for time sensitive crisis action planning (CAP) for the branches and sequels because the CAP conducted within the ROE cell disrupts the normal functions of the ROE cell and stretches the officers comprising it too thin to maintain the required number of meetings and work needed to support the ROE cell and CAP. In short, conducting CAP inside the ROE cell will dramatically increase the battle staff rhythm for the ROE cell. Since the ROE cell is less effective for CAP, the JTF commander may activate a joint planning group (JPG)¹⁹² to

¹⁸⁹ For a presentation at the VXIII Airborne Corps ROE Conference at Fort Bragg, North Carolina in May of 1996, Colonel James R. Schwenk, U.S. Marine Corps, coined the following jingle, "ROE rhymes with three not SJA." The purpose of this jingle was to emphasize that the responsibility for preparing the ROE rests with the J-3. The J-3 is the JTF staff section responsible for planning and conducting operations. See also Grunawalt, *supra* note 178, at 248.

¹⁹⁰ Commander Dave Wagner, U.S. Navy, during his presentation on August 8, 1997, at the Naval Justice School for the Law of Military Operations course, stated that Brigadier General M. R. Berndt, U.S. Marine Corps, Director, Joint Training Analysis and Simulation Center and the J-7, U.S. Atlantic Command had approved the inclusion of the ROE cell concept in the new draft of the Joint Tactics, Techniques and Procedures Publication. See WORKING DRAFT, THE JOINT CHIEFS OF STAFF JOINT PUBLICATION 1-04, JOINT TACTICS, TECHNIQUES AND PROCEDURES (JTTP) FOR LEGAL SUPPORT TO MILITARY OPERATIONS (copy on file with the author). Commander Wagner also indicated that the ROE cell concept is being included in the new draft of The Joint Chiefs of staff the Joint Publication 5-00.2, *Joint Task Force Planning Guidance and Procedure*.

¹⁹¹ A specialist like an engineer can provide the ROE cell with a wealth of information concerning the structural weaknesses of a target, the best weapon system to destroy a target and the environmental impact that might be caused by the target's destruction.

conduct this type of planning. For an effective JPG, the Staff Judge Advocate or his deputy should be made a part of this group. By including the Staff Judge Advocate, the requisite synergy will be present within the JPG for the concurrent development of the ROE with the courses of action. This will permit the JPG to eliminate those courses of action which cannot be supported by the ROE before further time and effort is expended on them. Once the CAP is complete and the execution phase begins, the command may return to the use of the ROE cell to determine if the ROE need modification to respond to any change in the mission or threat level. The following simple equation may be used to identify when changes to the ROE might be required: mission + threat = ROE. If the mission changes or the threat level changes, the ROE must be reviewed to ascertain whether modifications should be made.

3. ROE Preparation For the Employment of Non-lethal Weapons

It may seem like a cliché, but properly crafted ROE are essential to the success of all operations. When formulating the ROE for an operation (to include one which will involve the employment of non-lethal weapons), the objective is to utilize the ROE cell or its equivalent to anticipate and brainstorm as many different foreseeable circumstances as possible and from this group interaction generate clear, unambiguous guidance for those military personnel who will be placed in harm's way. The two primary purposes for the ROE are to "provide implementation guidance on the inherent right and obligation of self-defense and the application of force for mission accomplishment."¹⁹³ All commanders must understand these two purposes, and how to utilize the ROE as a risk management tool. A mistake often made by commanders involves blurring the distinction between mission accomplishment and self-defense. This can lead not only to confusion within the command but also place those executing mission taskings at greater risk.

a. General Discussion of Self-defense

The right of a sovereign nation to use force in self-defense is a fundamental principle of customary international law, closely related to national independence, national existence and freedom from outside interference or intervention. A nation acting in self-defense does not gain the right to violate the law of armed conflict.¹⁹⁴ The inherent right of individual and collective self-defense is articulated in Article 51 of the United Nations Charter.¹⁹⁵ Included within self-defense is the right of anticipatory self-

¹⁹² The JPG is the core planning group for crisis action planning within a JTF. Discussion with Commander Dave Wagner, U.S. Navy, Joint Training Analysis and Simulation Center, the J-7, U.S. Atlantic Command on February 12, 1998.

¹⁹³ STANDING RULES OF ENGAGEMENT, *supra* note 164, at A-1.

¹⁹⁴ Any other rule would disregard the equal application of the law of armed conflict to both sides of the conflict. Green, *supra* note 127, at 327.

¹⁹⁵ Article 51 of the United Nations Charter states:

defense. When an imminent threat to a nation's safety, security or existence arises, that nation may protect itself through the exercise of proportionate force under the right of anticipatory self-defense.¹⁹⁶ The three criteria required for the exercise of anticipatory self-defense are: "(1) the threat in issue must be imminent [or] immediate; (2) the action taken must be

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action it deems necessary in order to maintain or restore international peace and security.

The term "inherent right of individual and collective self-defense" set forth in Article 51 of the United Nations Charter is intended to include the right of self-defense under customary international law as it existed when the United Nations Charter was written. J. L. Brierly, *The Law of Nations* 416-21 (6th ed. 1963); Gerhard von Glahn, *Law Among Nations* 129-33 (6th ed. 1992); and Annotated Supplement, *supra* note 188, at 4-10. For a discussion of self-defense as an inherent right see Yoram Dinstein, *War, Aggression and Self-Defense* 179-82 (2d ed., 1994). See also an excellent discussion of anticipatory collective self-defense in George K. Walker's article, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, in *The Law of Military Operations: Liber Amicorum Professor Jack Grunawalt* 365-425 (Michael N. Schmitt ed., Vol. 72, 1998).

¹⁹⁶ Sally V. Mallison and W. Thomas Mallison, as part of their discussion on naval targeting, reviewed the concept of self-defense under both the English and French texts of Article 51 of the United Nations Charter. The Mallisons found the English text of Article 51 to be inartfully drafted and inconsistent with the negotiating history. The French text was found to be consistent with the negotiating history since it used "the term 'aggression armee' which includes, but is not limited to, armed attack." *The Law of Naval Operations* 263 (Horace B. Robertson, Jr. ed. 1991). The negotiating history of Article 51 shows that necessary and reasonable anticipatory self-defense was intended to be retained as an essential element of individual and collective self-defense. *Id.* at 263-64 and Stanimar A. Alexandrov, *Self-defense Against the Use of Force in International Law* 97-99 and 143-44 (1996). In addition, Professor Leslie Green a renowned scholar of the law of armed conflict has stated "Article 51 of the United Nations Charter must include the right of anticipatory self-defense since a failure to reach this conclusion would mean nations who are not members of the United Nations would have a greater right of self-defense than those who are." This statement was made during a discussion of this issue on December 17, 1997. See also Green, *supra* note 127, at 320-321. Part of the right of self-defense is the right to prevent imminent attack. Activity reasonably construed as a direct and immediate threat to the safety, security or existence of a State gives that State the right to take action in anticipatory self-defense. Burdick H. Brittin, *International Law for Seagoing Officers* 33 (5th Ed. 1986). Two specific examples of anticipatory self-defense are the 1842 *Caroline* case and President Kennedy's ordering of the 1962 Cuban blockade. *The Law of Naval Operations*, *supra* note 196, at 262-66. INTERNATIONAL AND OPERATIONAL L. DEP'T THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK, 4-5, Charlottesville, Virginia 4-5 (1996)[hereinafter OPERATIONAL LAW HANDBOOK].

necessary (no viable alternative); and (3) the force used must be proportionate to the threat posed."¹⁹⁷

b. Elements of Self-defense

The two elements required for self-defense are necessity and proportionality. An understanding of these two elements is critical to the concept of self-defense and to the ROE. For it is necessity and proportionality, as amplified by the policy established in the Standing Rules of Engagement, "that will be the basis for the judgment of the commander as to what constitutes an appropriate response"¹⁹⁸ when acting in self-defense.

(1) Necessity

The principle of necessity is the key to determining whether a lawful reason exists for the use of force in self-defense. In this context, necessity refers to the presence of an imminent danger due to the activities or actions by adverse parties, forces or nations which triggers the right to use force. Under the Standing Rules of Engagement, the necessity for self-defense may be triggered by a hostile act¹⁹⁹ or demonstration of hostile intent.²⁰⁰ In sum, the policy guidance in the Standing Rules of Engagement has incorporated the principle of necessity as the trigger for the right to use force in self-defense.

(2) Proportionality

In self-defense proportional force means "[t]he force used must be reasonable in intensity, duration, and magnitude, based on all facts known to the commander at the time, to decisively counter the hostile act or hostile intent and to ensure the continued safety of [U.S.] forces."²⁰¹ Proportionality in self-defense, when boiled down to the basics, involves determining the amount of force that may be used to overcome the imminent danger created by a hostile act or demonstration of hostile intent (necessity). Although any decision regarding how much force is proportionate will be subjective,²⁰² the goal is to apply sufficient force to decisively handle the threat but no more than that.

¹⁹⁷ OPERATIONAL LAW HANDBOOK, *supra* note 196, at 4-5.

¹⁹⁸ *Standing Rules of Engagement*, *supra* note 164, at A-4.

¹⁹⁹ The term hostile act is defined as "an attack or other use of force by a foreign force or a terrorist unit (organization or individual) against the United States, [U.S.] forces, and in certain circumstances, [U.S.] citizens, their property, [U.S.] commercial assets, and other designated non-[U.S.] forces, foreign nationals and their property." STANDING RULES OF ENGAGEMENT, *supra* note 164, at A-5.

²⁰⁰ The term hostile intent is defined as "the threat of [the] imminent use of force by a foreign force or terrorist unit (organization or individual) against the United States, [U.S.] forces, and in certain circumstances, [U.S.] citizens, their property, [U.S.] commercial assets, and other designated non-[U.S.] forces, foreign nationals and their property." *Id.*

²⁰¹ STANDING RULES OF ENGAGEMENT, *supra* note 164, at A-5.

The difficult question is what constitutes proportional force in self-defense? But this question does not surface until the use of force is justified under the principle of necessity. When the proportionality issue arises in a self-defense context, the defender is normally facing a situation which requires a timely use of force to ensure self-preservation. At this point, proportionality for the defender becomes a process of deciding which available weapon system will provide the level of force needed to counter the imminent threat. Based on an assessment of the facts, the circumstances, the intelligence information regarding the imminent threat, and the weapon systems available, the defender must make a decision on the appropriate weapon system(s) to use. Two other important factors to be considered when making this decision are the need to minimize collateral damage²⁰³ to civilian property and to reduce the death and incidental injury²⁰⁴ to civilians.

c. Self-defense Under the ROE

Self-defense plays a critical role in the ROE for U.S. military forces. As discussed under the principle of necessity, self-defense may be triggered by the occurrence of a hostile act or by the demonstration of hostile intent by a foreign force or a terrorist group.²⁰⁵ Of these two concepts, hostile intent has always been the most difficult to ascertain. The determination of hostile intent is not based solely on objective criteria, but relies in large measure on the evaluation of intelligence information about the past, present, and future activities of a potential adversary and on the experience of the decision maker. A determination of hostile intent is, therefore, largely subjective.

Under the Standing Rules of Engagement, self-defense has been divided into two main categories. The first, national self-defense, consists of "defending the United States, [U.S.] forces, and in certain circumstances, [U.S.] citizens and their property, [U.S.] commercial assets, and other

²⁰² Green, *supra* note 127, at 331.

²⁰³ Collateral damage refers to the destruction of civilian property as the result of an attack upon a military objective, and it is considered lawful if the commander has taken steps to avoid excessive damage to civilian property. Like incidental injury to civilians, the commander must minimize collateral damage to civilian property consistent with mission accomplishment and force security. Protocol I, Art. 57 (4), *reprinted in* Documents on the Law of War 420 (Adam Roberts and Richard Guelff eds., 1982); Bothe ET AL., *supra* note 126, at 359-367, 372-73; Matheson, *supra* note 126, at 426; and Green *supra* note 127, at 120. *See also* ANNOTATED SUPPLEMENT, *supra* note 188, at 8-4 to 8-5.

²⁰⁴ Incidental injury refers to the injury and/or death of civilians from an attack upon a military objective. The principle of proportionality requires commanders to consider the effect that a future attack may have upon the civilian population in their pre-attack planning. *See* Protocol I, Arts. 48, 49 and 50, *reprinted in* Documents on the Law of War 414-415 (Adam Roberts and Richard Guelff eds. 1982). Attacks are "acts of violence against the adversary, whether in offense or defense." Protocol I, Art. 49, *reprinted in* Documents on the Law of War 414 (Adam Roberts and Richard Guelff eds. 1982). For more information on the definition and scope of the term "attack" *see* Bothe ET AL., *supra* note 126, at 286-291. *See also* footnote 219.

²⁰⁵ Standing Rules of Engagement, *supra* note 164, at A-5. *See also* footnotes 199 and 200.

designated non-[U.S.] forces, foreign nationals and their property, from a hostile act or hostile intent."²⁰⁶ Although often discussed as a separate type of self-defense, collective self-defense, defined as "defending other designated non-[U.S.] forces, personnel and their property, from a hostile act or hostile intent,"²⁰⁷ has been made a subset of national self-defense within the Standing Rules of Engagement. The second major category of self-defense is unit self-defense. Unit self-defense has been defined as "defending a particular unit of [U.S.] forces, including elements or personnel thereof, and other [U.S.] forces in the vicinity, against a hostile act or hostile intent."²⁰⁸ In similar fashion, the Standing Rules of Engagement make individual self-defense a subset of unit self-defense. Because the right of self-defense extends to the individual, commanders have a duty to ensure all individuals within their command have been made aware of and have received training on the principles of self-defense as articulated in the Standing Rules of Engagement.²⁰⁹

The use of non-lethal weapons by a commander or members of the commander's unit in self-defense (in response to a hostile act or to a demonstration of hostile intent) must comply with the principles of necessity and proportionality. This is not something new. Any application of force in self-defense, whether by a non-lethal or a lethal weapon system, would follow these principles. Non-lethal weapons simply provide the commander with an alternative to lethal force. It should be stressed that when a self-defense situation presents itself, the availability of non-lethal weapons does not limit the "commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense."²¹⁰ The words "all necessary means available" have a special classified meaning under the Standing Rules of Engagement.²¹¹ Even without discussing this definition, the intent rings clear. It means the commander may use either non-lethal weapons, lethal weapons or both in combination. In regard to actions in national and unit self-defense, the term "all necessary means available" has been amplified by specific policy guidance which states: "(1) [a]ttempt to [c]ontrol [w]ithout the [u]se of [f]orce . . . (2) [u]se [p]roportional [f]orce [t]o [c]ontrol the [s]ituation . . . [and] (3) [a]ttack [t]o [d]isable or [d]estroy."²¹² As indicated, the

²⁰⁶ Standing Rules of Engagement, *supra* note 164, at A-4.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at A-4 to A-5.

²⁰⁹ *Id.* at GL-10. Under the right of self-defense individuals have "the authority to use all means available and to take all appropriate action to defend themselves and other [U.S.] personnel in their vicinity." *Id.* at GL-11.

²¹⁰ DoD Dir. 3000.3, *supra* note 9, at 2. This language was lifted almost verbatim from the Standing Rules of Engagement. STANDING RULES OF ENGAGEMENT, *supra* note 164, at A-3. See also footnote 163.

²¹¹ To review the classified definition of "all necessary means available" See THE STANDING RULES OF ENGAGEMENT, *supra* note 164, at GL-4.

application of force in self-defense should be a last resort. If possible, the situation should be controlled without force or if force is needed, the force used "should not exceed that which is required to decisively counter the hostile act or hostile intent and ensure the continued safety of [U.S.] forces or other protected personnel or property."²¹³ Once the hostile force no longer represents an imminent threat, the right to use force in self-defense ends.²¹⁴ Clearly, non-lethal weapons offer the commander viable alternatives which may meet these policy goals. Since the self-defense obligation and authority is inherent in command, all commanders have a continuous and ongoing duty to evaluate the operational environment to determine whether the application of force for unit self-defense is appropriate.

d. Use of Force for Mission Accomplishment

The use of force for mission accomplishment under the Standing Rules of Engagement is distinct from the use of force for self-defense. When force is used for mission accomplishment, it is governed by the principles of necessity and proportionality as they apply under the law of armed conflict. In the law of armed conflict context, these principles have a much different application than they do under self-defense.

(1) Necessity

In armed Conflict, only that amount of force necessary to defeat the enemy may be employed. Any application of force unnecessary to that purpose is prohibited. In short necessity limits the amount and kind of force to that which is permitted under the law of armed conflict. In this context, the term necessity is often referred to as military necessity.²¹⁵ It is important to note that military necessity does not mean military expediency. Military expediency may not be used as an excuse to expand the use of force under necessity in order to sanction violations of those protections set forth in the law of armed conflict. Military necessity simply permits attacks on lawful military objectives whose "nature, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization at the time offers a definite military advantage."²¹⁶ Under this principle, force may lawfully be

²¹² *Id.* at A-6.

²¹³ *Id.* at A-6.

²¹⁴ *Id.* at A-7.

²¹⁵ ANNOTATED SUPPLEMENT, *supra* note 188, at 5-4. See also Green, *supra* note 127, at 118-119. Professor Green explains that the concept of military necessity cannot be used to reduce the entire body of the law of armed conflict to a "code of military convenience." *Id.* 118. In other words "an unlimited doctrine of military necessity cannot be accepted today." von Glahn, *supra* note 195, at 697. Under the principle of necessity for self-defense force is not warranted until peaceful means have been found wanting or would clearly be futile. Dinstein, *supra* note 195, at 202.

²¹⁶ Protocol I, Art. 52 (2), reprinted in Documents on the Law of War 417 (Adam Roberts and Richard Guelff eds., 1982). The United States considers this statement to be part of the

used against those locations or places which are being used for a military purpose by an adversary or against the military personnel of that adversary. Under the Standing Rules of Engagement, once an adversary's military units have been declared hostile by appropriate authority, U.S. military units need not observe a hostile act or a demonstration of hostile intent before engaging them.²¹⁷

(2) Proportionality

What constitutes proportional force under the law of armed conflict may be very different from the quantum of force that may lawfully be used to respond to a hostile act or to a demonstration of hostile intent in self-defense. The primary difference involves the ultimate end state. During war, the goal is to obtain the submission of the adversary through the defeat of the adversary's military structure or units by overwhelming force. In contrast, self-defense is designed to counter the threat of an adversary, to ensure the continued safety of U.S. forces, and, where applicable, to deter or modify an adversary's (State or terrorist organization) future behavior.

The principle of proportionality in the law of armed conflict requires that the military action not cause collateral damage²¹⁸ or incidental injury which is excessive in light of the expected military advantage. The best decision

customary international law. General Counsel, Department of Defense, letter of September 22, 1972, reprinted in 67 Am J. Int'l L. 123-24 (1973). The term "definite military advantage" is often referred to as the advantage gained by the neutralization of an enemy's war-fighting and war-sustaining capability. See ANNOTATED SUPPLEMENT, *supra* note 188, at 8-2.

²¹⁷ Under the Standing Rules of Engagement, force may only be used in self-defense or against those forces who have been declared hostile (Adversary forces are most often declared hostile for mission accomplishment purposes.). For the U.S. military, the authority to declare a force hostile is limited under the Standing Rules of Engagement. STANDING RULES OF ENGAGEMENT, *supra* note 164, at A-5 to A-6. Once an adverse force has been declared hostile by appropriate authority, U.S. military units may engage that force (including their military equipment and sustainment structure) worldwide (except in neutral territory) without first observing a hostile act or a demonstration of hostile intent by that adverse force. *Id.* In neutral territory (which includes neutral airspace, neutral water and neutral lands), all acts of hostility are prohibited. 1907 Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, Chapter I -- The Rights and Duties of Neutral Powers [hereinafter 1907 Hague Convention V], Art. 1, reprinted in Documents on the Law of War 63 (Adam Roberts and Richard Guelff eds., 1982). When a neutral State is unwilling, unable or otherwise fails to enforce its obligation to prevent unlawful belligerent use of its territory, an exception arises under the law of neutrality which allows for the engagement of those belligerent forces operating within the neutral's territory by the other belligerent. Green, *supra* note 127, at 260-261; von Glahn, *supra* note 195, at 847; and ANNOTATED SUPPLEMENT, *supra* note 188, at 7-6. For U.S. military forces this exception is known as self-help. Self-help is a remedy available under international law to those States whose rights have been violated. There are a variety of different self-help remedies. In addition, to the forcible means of self-help (also known as armed self-help or war), there are non-forcible means such as the severing of diplomatic relations or the declaring of a foreign diplomat *persona non grata*. For a discussion of self-help see von Glahn, *supra* note 195, at 633-45; Dinstein, *supra* note 195, at 175; and Alexandrov, *supra* note 196, at 11-19 (1996).

²¹⁸ See footnote 203.

making tool available to help the commander determine what constitutes proportionate force for mission accomplishment is the balancing test.²¹⁹ This test weighs the possible harmful effects of the level of force contemplated in terms of incidental injury to civilians and collateral damage to civilian property against the expected military advantage.

Although customary international law may appear to remain constant, it does slowly change to incorporate new battlefield practices of warring land, naval and air forces. Once a practice has obtained a degree of regularity and is accompanied by a belief among nations that it is obligatory, that rule becomes a part of customary international law.²²⁰ In this light, the actions of the United States and the other nations comprising the coalition force during Operation Desert Storm²²¹ raise an important issue. Did the manner in which this military operation was conducted²²² modify the proportionality principles of incidental injury and collateral damage? That question is still unanswered, but the meticulously orchestrated bombing campaign conducted by the coalition forces against Iraq provides strong evidence of what the United States and the other coalition nations felt they were obligated to do as a matter of law and to maintain international and domestic public support for this military action. To those who argue these actions have changed the principles of incidental injury and collateral damage, the United States has responded that the use of "smart" bombs against Iraq did not appreciably change the principle of proportionality. Irrespective of whether the legal standard has changed, with an expected increase in the use and availability of non-lethal and precision guided lethal weapons on the horizon, the politically acceptable level of incidental injury and collateral damage is likely to become more restrictive in the future for those nations possessing such weapons.

²¹⁹ The incidental injury of civilians during an attack on a legitimate military target is lawful if the commander has taken reasonable precautions to minimize civilian casualties consistent with mission accomplishment and force security. Protocol I, Art. 57 (4), *reprinted in* Documents on the Law of War 420 (Adams Roberts and Richard Guelff eds. 1982); Bothe ET AL., *supra* note 126, at 359-367, 372-73; Matheson, *supra* note 126, at 426; and Green *supra* note 127, at 120. *See also* Annotated Supplemental, *supra* note 188, at 8-4 to 8-5. *See also* footnote 204.

²²⁰ Brittin, *supra* note 196, at 11 and von Glahn, *supra* note 195, at 17-20. *See the discussion of* customary international law in footnote 188.

²²¹ Operation Desert Storm, sometimes called the "Persian Gulf War," began when Phase I (the Strategic Air Campaign) started on January 16, 1991. This operation was the military response to Iraq's invasion of Kuwait on August 2, 1990. The victory of the United States-led coalition over the Iraqi forces was swift and decisive. *Conduct of the Persian Gulf War*, Final Report To Congress (Pursuant to Title V of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991) (April 1992) [hereinafter Title V Report].

²²² During Operation Desert Storm, coalition forces took extraordinary steps to minimize the damage to civilian property and the risk of injury to civilians. To the degree feasible after taking into account allowable risk to coalition land, naval and air forces, attacks were executed within populated areas with munitions offering the highest degree of accuracy available in order to reduce the risk of incidental injury to the civilian population and collateral damage to civilian objects. *Id.* at 611-17.

e. Preparation of ROE for Mission Accomplishment

In contrast to the self-defense guidance in the Standing Rules of Engagement, the ROE for mission accomplishment are tailored to meet the specific needs of the mission. Mission accomplishment ROE are crafted by modifying the standing rules of engagement through supplemental measures. Various categories of supplemental measures are set forth in Enclosure B to the Standing Rules of Engagement.²²³ Within Enclosure B, the following policy has been given special emphasis by being placed in all capital letters and bold faced type:

**SUPPLEMENTAL MEASURES DO NOT
LIMIT A COMMANDER'S INHERENT
AUTHORITY AND OBLIGATION TO USE
ALL NECESSARY MEANS AVAILABLE
AND TO TAKE ALL APPROPRIATE
ACTION IN SELF-DEFENSE OF THE
COMMANDER'S UNIT AND OTHER [U.S.]
FORCES IN THE VICINITY.²²⁴**

As indicated by this policy, the right of self defense always exists and may not be changed through supplemental measures. Supplemental measures "define the limits or grant authority for the use of force for mission accomplishment, not for self-defense."²²⁵ Through supplemental measures, the commander may grant to subordinate units or may obtain from superior headquarters those additional authorities desired for mission accomplishment or may impose specific restraints on how to carry out the mission.

When Enclosure B does not include an authority or restraint which is necessary to the mission, a new supplemental measure may be drafted to fill this need. Spares (open supplemental measures) are included throughout the different categories to allow the crafting of mission specific special supplemental measures. All the supplemental measures selected from Enclosure B or those specially drafted must be consistent with the three bases for the ROE (national policy, operational requirements and the law).²²⁶ The message formats for requesting and authorizing supplemental measures for the ROE and examples of completed messages are included in Enclosure B.²²⁷

²²³ STANDING RULES OF ENGAGEMENT, *supra* note 164, at B-1.

²²⁴ *Id.* at B-1.

²²⁵ *Id.*

²²⁶ See Grunawalt, *supra* note 178. For a discussion of the bases for the ROE see pages 36-38.

²²⁷ STANDING RULES OF ENGAGEMENT, *supra* note 164, at B-1. The message formats and examples are listed in Appendix E to Enclosure B on pages B-E-1 through B-E-7 of the Standing Rules of Engagement.

There is an ongoing debate about whether a fundamental change to the Standing Rules of Engagement is necessary to meet the operational requirements presented by the employment of non-lethal weapons in a MOOTW.²²⁸ Currently, no consensus has developed to support this change.²²⁹ Quite to the contrary, it is generally felt that no major change to the Standing Rules of Engagement is needed to support the employment of non-lethal weapons in future MOOTWs. Rather, the same considerations which go into the drafting of the ROE for traditional lethal weapons must be applied to this new capability. Although this debate concerning MOOTWs will continue, the real focus should be on training commanders and their staffs on the use of the Standing Rules of Engagement so that they have the ability to prepare appropriate ROE for the employment of both non-lethal and lethal weapon systems.

When drafting the ROE for any operation, the commander and members of the ROE cell (if the ROE cell concept is employed) or key staff personnel (the J-3, the J-2, SJA, etc.) must have a firm understanding of national policy, the operational requirements and the law as it applies to that

²²⁸ One advocate of change is Major Vaughn Ary, a U.S. Marine Corps judge advocate. See Major Vaughn Ary, *New Rules of Engagement For Today's Missions* (1996) (unpublished manuscript on file with the author who is attending the Marine Corps Command and Staff College in Quantico, Virginia). In this paper, Major Ary argues that the MOOTW is a different type of operation which sets forth different mission objectives and use of force requirements. Since the MOOTW is unlike traditional armed conflict, he recommends a major change to the Standing Rules of Engagement so that U.S. military forces may use force in circumstances other than self-defense to accomplish the mission. Implicitly, he argues that this change is needed to allow the application of non-lethal weapons during a MOOTW. *Id.* at 3-5.

²²⁹ There have been no major changes recommended by the CINCs to the Standing Rules of Engagement. This statement is based on a discussion with Captain Jane Dalton, U.S. Navy, Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff on December 8, 1997, and on discussions with representatives from the various CINC legal offices who attended the Non-lethal Weapons Standing Rules of Engagement Conference in Quantico, Virginia on January 7, 1998. However, there have been some minor cosmetic changes recommended to the Standing Rules of Engagement. Among those recommended changes is a proposal to consolidate all use of force rules for U.S. military units into one document. This consolidation is designed to add the Commandant of the U.S. Coast Guard Use of Force Instruction for Maritime Interdiction Operations and Maritime Law Enforcement Operations to the special theater level ROE in Enclosure C to the Standing Rules of Engagement. For a copy of the Commandant of the U.S. Coast Guard Use of Force Instruction see Chapter 4 of COMDTINST M16247.1A. Another recommended change is to include a brief discussion of the ROE cell concept within the Standing Rules of Engagement. For a discussion of the ROE cell concept see pages 39-40. To avoid confusion, there is also a recommendation to clarify the term "all necessary means available." It is recommended that this term be clarified on the page where it first appears in the Standing Rules of Engagement. The special definition for the term "all necessary means available" may be found on page GL-4 of the Standing Rules of Engagement. Furthermore, there is a recommendation to clarify the terms OPCON versus TACON with regard to military units assigned to operations under U.S. Coast Guard control. In addition, the movement to develop a separate "Non-lethal Weapons Annex" similar to other annexes already in the Standing Rules of Engagement was determined to be unnecessary at the conference sponsored by the JNLWD in Quantico, Virginia, on January 7, 1998. For more information on the conference see CMC messages R 041445Z Dec 97 and R 131217Z Jan 98 and the Director, JNLWD letter of January 15, 1998, containing the minutes from the conference (copy on file with the author).

specific mission. Once these issues have been identified, the ROE cell should start reviewing the potential supplemental measures available in Enclosure B of the Standing Rules of Engagement. The development of the ROE for the operation should parallel the preparation of the courses of action for the mission. For each of the expressed and implied taskings identified in the mission, the operation plan should set forth the special capability the command needs to accomplish that specific task. Next, the commander and the J-3 must identify the type of weapon systems that will be used to provide the capability to accomplish the identified task. For each non-lethal or lethal weapon system selected to meet an operational capability, the commander, the J-3 and the ROE cell need to be made aware of the specific characteristics of that weapon system. These characteristics may influence how potential supplemental measures, if needed, will be crafted in order to provide for the proper employment of that weapon system. Once the weapon systems are identified, the ROE cell may need to incorporate supplemental measures that will permit either the unfettered or restricted use of those weapon systems.²³⁰ These measures should cover the use of force required to satisfy the capabilities that have been identified as necessary for mission accomplishment. In many instances the standard supplemental measures chosen from Enclosure B may require modification when providing guidance on the employment of non-lethal weapons.²³¹ Through the modification of an existing supplemental measure or through the drafting of a spare supplemental measure, the ROE cell may generate tailor-made ROE for the operation. The ultimate goal of this entire process is to provide sufficient guidance to the members of the command so that no hesitation arises when a decision must be made on when and how to use force.

VI. Conclusion

If the United States is to maintain technological superiority on the battlefield, traditional military planning and thinking must be modified to ensure non-lethal technologies are considered during the operational planning phase and not as an afterthought. Movement in this direction has begun. Today, each CINC has the duty to ensure that procedures exist for the integration of non-lethal weapons into operational mission planning.²³² Hesitancy to employ new systems should not prevent the exploitation of non-

²³⁰ However, this does not mean that every application of a non-lethal weapon system will require a specific supplemental measure within the ROE before it may be employed.

²³¹ Although a few supplemental measures scattered throughout the various categories in Enclosure B deal with non-lethal weapons, most do not. This means, that to prepare the portion of the ROE that deals with the employment of non-lethal weapons, the drafter of the ROE must either modify supplemental measures which deal with lethal weapons or utilize spares to create them. See the STANDING RULES OF ENGAGEMENT, *supra* note 164 (Enclosure B).

²³² DoD Dir. 3000.3, *supra* note 9, at 3.

lethal technology, for "once in a while a door opens and lets the future in."²³³ Non-lethal systems provide commanders with the tools to dominate maneuver, shape the battlefield, and provide enhanced protection to their forces. By requiring commanders to consider the application of non-lethal technologies for all operations, the full dimensional protection envisioned by Joint Vision 2010²³⁴ will be achieved. In the words of General John Sheehan, U.S. Marine Corps, "[non-lethal arms] will always be tomorrow's weapons unless we move now. We need to pull them from the laboratories and place them in operational units."²³⁵

If one reviews a number of different scenarios spanning the spectrum of conflict for the type of weapon systems that should be used, the analyses will suggest that a force equipped with a mixture of non-lethal and lethal conventional weapon systems is superior to one equipped solely with lethal conventional weapon systems. Since the ultimate goal of the United States is to field a superior military force, that force must be equipped with non-lethal and lethal weapon systems. As commanders become more familiar with non-lethal weapons and their applications on the modern battlefield, the status of non-lethal technology will be elevated. Over time, old stereotypes which infer that killing or destroying the enemy is the only path to victory will be modified to reflect the impact of non-lethal technology. A new stereotype will emerge that recognizes that killing or destroying the enemy is not the only way to defeat him.

²³³ The U.S. Council on Foreign Relations used this quotation from Graham Green to encourage the Department of Defense to pursue the development and exploration of non-lethal weapons. *Open Door For Nonlethals*, Defense News, May 6-12, 1996 at 18.

²³⁴ "THE JOINT CHIEFS OF STAFF," *Joint Vision 2010: America's Military Preparing for Tomorrow*, July 1995.

²³⁵ John B. Alexander, *Shoot, But Not To Kill: Non-lethal Weapons Have Yet To Establish A Military Niche*, *Jane's International Defense Review*, No. 6, 1996 at 77.

Legal Aspects of Information Warfare: Military Disruption of Telecommunications

Commander Roger D. Scott*

Since the "discovery" of Information Warfare (IW) as a separate military discipline in the years following Desert Storm, attention has finally turned from excitement over general principles and possibilities to specific tactical applications. Armed now with basic doctrine and a cache of esoteric gadgets, the new Information Warriors are ready to enter the battle of the electrons. Advocates of Information Warfare once alleged that traditional legal principles did not apply to their novel vision of non-kinetic weapons, as if, for example, there were some fundamental legal difference between shooting down a suspect aircraft with 20 mm rounds and causing it to crash by clandestinely jamming its avionics—a point of view that confuses provability with responsibility. Unfettered by law, imaginations ranged freely over fertile ground and many IW capabilities were developed by various organizations. As new IW methods are now offered as options for responding to national security threats, the legal community is forced to identify the legal implications of new Information Warfare techniques. IW raises many legal issues. This paper explores legal issues raised by one area of potential IW activity—military disruption of telecommunications.

Prior to employment, any new weapons system must be reviewed for compliance with domestic and international law.¹ A weapon review must address the following issues:

a) whether domestic or international law specifically prohibits the development or use of a particular type of weapon;²

* Judge Advocate General's Corps, U.S. Navy. Presently assigned as Assistant Legal Advisor, U.S. European Command. LL.M., 1994, University of Virginia School of Law; J.D., 1986, University of Virginia School of Law (Order of the Coif, Law Review); M.A., 1997, Naval War College (Highest Distinction). Formerly assigned as Head, Operational Law Department, International and Operational Law Division, Office of the Judge Advocate General, Department of the Navy (1994-96); Chief, International and Operational Law Branch, Office of the Staff Judge Advocate, U.S. Special Operations Command (1990-93); Staff Judge Advocate, Cruiser-Destroyer Group TWO (1988-90); Attorney-Advisor, Naval Legal Service Office, Charleston (1986-88); Law Education Program (1983-86); Supply Department Head, USS Philadelphia (SSN 690).

¹ See DEPARTMENT OF DEFENSE, DIRECTIVE 5000.1, *Defense Acquisition*, Mar. 15, 1996, par. D.2.j; and SECRETARY OF THE NAVY, INSTRUCTION 5711.8A, *Review of Weapons Under International Law*, Jan. 29, 1988. These directives require the Judge Advocate General of the pertinent Service to review all new weapons systems for legality. See also NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK OF THE LAW OF NAVAL OPERATIONS 6-29 (employing forbidden weapons is a category of war crimes), 9-1 (1997).

b) whether the weapon causes suffering that is needless, superfluous, or disproportionate to the military advantage reasonably expected from use of the weapon;³ and

c) whether the weapon is sufficiently capable of being controlled so that its effects may be directed against lawful targets.⁴

Some weapons are subject to specific prohibitions, such as weapons that employ poison.⁵ Weapons which are not subject to a specific prohibition must also satisfy a balancing test that weighs the degree of suffering that might be caused by the weapon against the military necessity to use the weapon. Weapons must also be controllable or discriminate.

The capability considered in this paper involves the disruption of specifically selected telecommunications circuits, a form of "electronic attack" (EA).⁶ No provision of domestic or international law imposes a *per se* ban on the development or use of a weapon designed to disrupt electronic communications. Disruption of electronic communications would not cause unnecessary physical suffering in the sense, for example, that glass bullets might.⁷ Moreover, the hypothetical capability to disrupt particular telecommunications could be highly controllable and discriminate, focused on individual frequencies or messages. A weapon designed to disrupt telecommunications could be developed, procured and fielded for use during international armed conflict, consistent with domestic and international law. However, this inquiry into legal restrictions does not end with the conclusion that such a weapon could be developed and added to inventory. The legal conditions applicable to the use of such a weapon, particularly during peace operations, are extremely complex.

² For an example of a weapon banned *per se*, see 18 U.S.C. § 175 (1992) (prohibiting the development, production, stockpiling, transfer, acquisition, retention or possession of any biological agent, toxin or delivery system for use as a weapon).

³ E.g., NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK OF THE LAW OF NAVAL OPERATIONS 9-2 to 9-4 (1997); DEPARTMENT OF THE ARMY, PAMPHLET 27-161-2, 2 *International Law* 40 (1962) (quoting relevant provisions of the Annex to Hague Convention IV and the Declaration of St. Petersburg).

⁴ E.g., NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK OF THE LAW OF NAVAL OPERATIONS 9-4 (1997).

⁵ E.g., DEPARTMENT OF THE ARMY, PAMPHLET 27-161-2, 2 *International Law* 40-41 (1962) (Annex to Hague Convention IV, article 23).

⁶ See CHAIRMAN, JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, Mar. 23, 1994, "electronic warfare;" CHAIRMAN, JOINT CHIEFS OF STAFF, INSTRUCTION 3121.01 CH-1, *Standing Rules of Engagement for U.S. Forces*, Dec. 22, 1994, at GL-7 [hereinafter SROE].

⁷ E.g., DEPARTMENT OF THE ARMY, FIELD MANUAL 27-10, *The Law of Land Warfare* 18 (1956).

Rules of Engagement—Armed Conflict. During armed conflict, the traditional law of war must be observed when employing any military capability, including IW techniques. Under the law of war, only legitimate military objectives are subject to attack. Legitimate military objectives for equipment designed to disrupt electronic telecommunications would include any telecommunications that contribute to an enemy's warfighting or war-sustaining effort.⁸ However, persons and objects accorded protected status under the law of war, such as medical personnel and facilities, may not be attacked as military objectives.⁹ Similarly, telecommunications that provide necessary support to protected activities, such as hospitals and mobile medical units, may not be attacked as military objectives. Notwithstanding the self-aggrandizing claims of some IW supporters that their creative new trade transcends the scope of existing, superannuated law, the law of war applies readily to information warfare techniques. As another example, just as noncombatants may not be looted of tangible personal property face to face,¹⁰ their assets may not be erased from afar by an information attack targeted against their bank records. Specific targeting proposals during armed conflict should be reviewed and approved in accordance with procedures established by the Joint Force Commander, usually through a Joint Targeting Coordination Board.¹¹ In determining the constraints imposed on information attack by the law of war the focus of analysis must be the intent and likely results of an attack, not the novel method of attack. Specific legal issues raised by particular target proposals should be assessed under the law of war on a case-by-case basis during traditional mission planning processes. Anyone with an understanding of the fundamental principles of the law of war will not need specific, "no-brainer" precedents to assess the legality of proposals for information attack.

Rules of Engagement -- Military Operations Other Than War. The Standing Rules of Engagement for U.S. Forces;¹² Joint Electronic Warfare Policy,¹³ and Joint Information Warfare Policy,¹⁴ provide guidance on the use

⁸ See NAVAL WARFARE PUBLICATION 1-14M, *The Commander's Handbook of the Law of Naval Operations*, §§ 8.1.1 and 8.1.2 (detailed guidance on the selection of lawful targets during armed conflict). In general, proper military objectives of attack would include enemy communications, means of communication, and other objects used to support military operations.

⁹ E.g., NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK OF THE LAW OF NAVAL OPERATIONS 8-25 (medical facilities, units, equipment, stores), 11-6 to 11-7 (medical personnel) (1997).

¹⁰ *Id.*, at 6-29; DEPARTMENT OF THE ARMY, FIELD MANUAL 27-10, *The Law of Land Warfare* 21, 107, 150 (1956). See 10 U.S.C. § 899 (Uniform Code of Military Justice, Article 99).

¹¹ See JOINT PUBLICATION 3-0, *Doctrine for Joint Operations*, Feb. 1, 1995.

¹² SROE, *supra* note 6.

¹³ CHAIRMAN, JOINT CHIEFS OF STAFF (CJCS), INSTRUCTION 3210.03, *Joint Electronic Warfare Policy*, Nov. 22, 1996 (formerly Memorandum of Policy (MOP) Number 6, *Electronic Warfare*, Mar. 3, 1993), [hereinafter CJCSI 3210.03.]

¹⁴ CJCS INSTRUCTION 3210.01, *Joint Information Warfare Policy*, Jan. 2, 1996, [hereinafter CJCSI 3210.01.]

of electronic attack (EA) measures during armed conflict and during peacetime military operations. It should be no surprise that use of electronic attack techniques is limited to the same circumstances under which traditional kinetic force may be used -- during war, in unit self-defense, and when directed by the National Command Authority (the President or Secretary of Defense). Chairman, Joint Chiefs of Staff, Instruction 3210.03 provides procedures to request approval for preplanned EA not in the preapproved categories.¹⁵ In accordance with CJCSI Memorandum of Policy (MOP) 6, the predecessor of CJCSI 3210.03, U.S. commanders were authorized to employ destructive and nondestructive EW against communications of an opposing force or terrorist unit when one or more of the following conditions were met: during war or armed conflict; when responding in self-defense to demonstrated hostile intent or a hostile act; when the use of force was directed by the National Command Authority. CJCSI 3210.03 has eliminated separate discussion of the circumstances when EA may be used and simply refers to the Standing Rules of Engagement.¹⁶ Under the SROE, EA against foreign communications may be used in self-defense, or when directed by NCA.¹⁷ The SROE do not address the use of EA against domestic communications, indicating that standing authority for such activity has not been granted. Chairman, Joint Chiefs of Staff, Instruction 3210.01, *Joint Information Warfare Policy*, specifically addresses the use of offensive IW capabilities in peacetime Military Operations Other Than War (MOOTW). In accordance with CJCS Instruction 3210.01, the employment of IW offensive capabilities in MOOTW requires NCA approval with support, coordination, deconfliction, cooperation, and/or participation by other relevant U.S. government departments and agencies. Examples of potential peacetime applications of offensive IW include counterdrug operations,¹⁸ counterproliferation of weapons of mass destruction (WMD) and demonstrations designed to achieve deterrence.

The authority to use EA in peacetime operations is described consistently in the SROE, CJCSI 3210.03/MOP 6, and CJCS Instruction 3210.01: EA may be used in individual or unit self-defense (as defined in the SROE) or with NCA approval. Any peacetime application of EA other than unit self-defense must be approved by NCA. The Appendix in CJCSI 3210.03 (*Procedural Guidance for Submission of Nondestructive EW Plans, Methods*

¹⁵ CJCSI 3210.03, MOP 6, *supra* note 13, [Appendix to Enclosure A, pp. A-1 to A-3.]

¹⁶ CJCSI 3210.03, *supra* note 13, at enclosure A, par. 1b(1), p. A-5.

¹⁷ SROE, at A-A-A-1 to A-A-A-2.

¹⁸ DoD's lead agency role in counterdrug matters, however, is limited to detecting and monitoring the transit of illegal drugs into the United States (10 U.S.C. § 124) (1992). Other operational DoD counterdrug activity is performed in support of federal, state and local law enforcement agencies, or in accordance with DoD Directive 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials*, Jan. 15, 1986; and CJCS INSTRUCTION 3710.01, *Delegation of Authority for Approving Operational Support to Drug Law Enforcement Agencies and Counterdrug-Related Deployment of DoD Personnel*, May 28, 1993. See 10 U.S.C. §§ 371-377 (1992). In the counterdrug context, disruption of telecommunications would most likely be conducted by another federal agency with interdiction authority.

and Techniques) spells out the specific information that must be included in requests for NCA approval of each operation involving preplanned peacetime EA. Supplemental rules of engagement may also be proposed in any request. Requests for mission-specific modifications to the SROE are described in enclosure (b) to CJCS Instruction 3121.01. In each case where variation from the SROE is desired, a specific supplemental measure (constrained EA permitted) may be requested, with specific description of the EA that would be conducted.

Legal Considerations for NCA Approval of EA in Peacetime. As stated, EA against foreign communications may be employed lawfully in combat operations during armed conflict and in individual or unit self-defense. NCA may also direct the employment of EA against foreign communications during military operations conducted in national self-defense.¹⁹ However, the use of EA during non-defensive peacetime MOOTW raises difficult legal issues which must be addressed on a case-by-case basis, depending on the nature of the intended operations. Legal issues which could affect NCA approval of peacetime EA are discussed individually below.

Self-defense The SROE applies the same principles to EA that it applies to the use of physical or kinetic force. The fact that EA involves intangible forces has not led to special exceptions to the normal rules governing the use of force in peacetime. Generally, the use of force in peacetime is limited to self-defense, as a consequence of the fundamental principle that underlies the U.N. Charter system -- nations acting unilaterally may only use force in "individual or collective self-defense if an armed attack occurs against a Member of the United Nations."²⁰ Any request for NCA permission to conduct EA against foreign communications must be assessed for compliance with the principle of self-defense in international law. Any EA against foreign communications that might be perceived as aggression, as a hostile act or as evidence of hostile intent not justified by the principle of self-defense, would be subjected to particularly critical scrutiny in a request for NCA approval.²¹

U.N. Security Council Resolutions. Unlike the rule applicable to nations acting unilaterally, the authority of the United Nations Security Council to call for the use of force is not limited to situations of self-defense. The U.N. Security Council may respond to breaches of international peace or threats to international peace and security by authorizing "complete or partial interruption of . . . telegraphic, radio, and other means of communication,"²²

¹⁹ Past examples of national self-defense operations include EL DORADO CANYON (airstrikes against Libya in 1985) and PRAYING MANTIS (destruction of Iranian oil platforms in the Persian Gulf in 1987).

²⁰ U.N. CHARTER, art. 51.

²¹ EA against foreign communications with the consent or participation of the affected foreign nation would not raise issues of the law of self-defense. Examples could include international counterdrug or counterterrorist operations, in which a cooperating nation authorized EA against communications within its domestic authority to control.

as well as traditional military combat operations.²³ The U.N. Security Council has authority to authorize the pacification of a disturbed area or the forceful imposition of sanctions on a nation proactively, without regard to issues of self-defense. Thus, EA could be employed under a wider variety of circumstances under the authority of a UN Security Council resolution. The existence of a supporting UN Security Council resolution would be a key factor in NCA consideration of a request to use EA in peacetime.

Telecommunications Law. "Harmful interference"²⁴ with domestic and international telecommunications is regulated by federal law in the United States, and by the International Telecommunication Conventions of Malaga-Torremolinos (1973) and Nairobi (1982)²⁵ internationally. NCA consideration of a request to conduct EA against telecommunications in peacetime would include, on a case-by-case basis, assessment of the impact of applicable telecommunications law.

International Telecommunications Law. Both the Malaga-Torremolinos Convention and the Nairobi Convention provide, in Articles 4 and 10, that the International Telecommunications Union (ITU), through the International Frequency Registration Board (IFRB), is responsible for the international allocation and registration of radio frequencies. These conventions urge respect for international communications and for treaty-based frequency allocations, specifically prohibiting "harmful interference" with radio services or communications of other States Parties or authorized private operating agencies.²⁶ Article 38 of both conventions leaves the regulation of

²² U.N. CHARTER art. 41. See articles 24 and 39 for the Security Council's authority to "maintain or restore international peace and security" by the use of proactive, non-defensive force.

²³ U.N. CHARTER, art. 42.

²⁴ "Harmful interference" is a term of art, defined in domestic and international regulations as "interference which endangers the functioning of a radionavigation service or of other safety services or seriously degrades, obstructs or repeatedly interrupts a radiocommunication service." "Radiocommunication" is broadly defined as "telecommunication by means of radio waves," and "telecommunication" is broadly defined as "any transmission, emission, or reception of signs, signals, writing, images and sounds or intelligence of any nature. International Telecommunications Convention (Nairobi 1982), S. TREATY DOC. 99-6, 99th Cong., 1st Sess. (1982), Annex 2, arts. 2003, 2011, 2015; 47 C.F.R. § 2.1(c).

²⁵ International Telecommunications Convention, with annexes and protocols (Malaga-Torremolinos 1973), 28 U.S.T. 2495, T.I.A.S. No. 8572, 1209 U.N.T.S. 32; International Telecommunications Convention, with annexes and protocols (Nairobi 1982), *reprinted in* S. TREATY DOC. 99-6, 99th Cong., 1st Sess. (1982).

²⁶ Article 35 of both conventions provides as follows:

1. All stations whatever their purpose, must be established and operated in such a manner as not to cause harmful interference to the radio services or communications of other Members or of recognized private operating agencies, or of other duly authorized operating agencies which carry on radio service, and which operate in accordance with the provisions of the Radio Regulations.

military radio installations to the individual States Parties, but article 38 also includes the obligation that such installations "must, as far as possible, observe provisions relative to . . . measures to be taken to prevent harmful interference, and the provisions of the Administrative Regulations concerning the types of emission and the frequencies to be used."²⁷

Article 19(2) Exemption. Notwithstanding the general obligation of non-interference with international telecommunications that is clearly manifested in international law, Article 19(2) of the Malaga-Torremolinos and Nairobi Conventions provides that "[m]embers . . . reserve the right to cut off any . . . private telecommunications which may appear dangerous to the security of the State or contrary to its laws, to public order or to decency." Thus, a properly authorized disruption of private telecommunications that fit within the exemption in Article 19(2) of the Conventions would not violate international telecommunications law.²⁸ However, the Conventions do not

2. Each Member undertakes to require the private operating agencies which it recognizes and the other operating agencies duly authorized for this purpose, to observe the provisions of [subparagraph 1].

3. Further, the Members recognize the desirability of taking all practicable steps to prevent the operation of electrical apparatus and installations of all kinds from causing harmful interference to the radio services or communications mentioned in [subparagraph 1].

²⁷ Although member states "retain their entire freedom with regard to military radio installations of their army, naval and air forces" under Article 38 of the International Telecommunications Conventions, Regulation No. 342 of the International Telecommunications Union's *Radio Regulations* adds that frequency assignments in derogation of the ITU Table of Frequency Allocations may only be made "on the express condition that harmful interference shall not be caused to services carried on by stations operating in accordance with the provisions of the Convention and of these Regulations." *Radio Regulations*, S. TREATY DOC. No. 97-21, 97th Cong., 1st Sess., 24 Nov 81. See U.S. DEPT. OF COMMERCE, *MANUAL OF REGULATIONS AND PROCEDURES FOR FEDERAL RADIO FREQUENCY MANAGEMENT* (the "NTIA Manual"), § 4.1.3, September 1, 1995, at p. 4-1. The general "non-interference" obligation in the telecommunications conventions is also manifested in the 1982 U.N. Law of the Sea Convention (LOS Convention), which prohibits "any act aimed at interfering with any systems of communication" while in innocent passage in a foreign territorial sea. United Nations Law of the Sea Convention (1982), article 19(2)(k) reprinted in 21 I.L.M. 1261-1354 (1982). Articles 58(2) and 109 of the LOS Convention also contain measures to suppress "unauthorized broadcasting" from an Exclusive Economic Zone or the high seas (but these provisions apply only to broadcasts intended to be received by the general public). International submarine cables and communications by such cables have been protected by international and U.S. domestic law since the nineteenth century. 1884 Convention on the Protection of Submarine Cables, 24 Stat. 989, TS No. 380, as amended 25 Stat. 1414, TS Nos. 380-1, 380-2, 380-3, 1 Bevans 89, 112, 114; Act of Feb. 29, 1888, c. 17, 25 Stat. 41 (the "Submarine Cable Act," codified at 47 U.S.C. §§ 21 to 33) (1992). Articles 113-114 of the LOS Convention continue the traditional protection of submarine cables. The law of war favors the continuation of international communications during armed conflict by providing that neutral powers do not compromise their neutrality by failing to interdict belligerent communications passing through neutral facilities. Hague Convention V, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, art. 8, 36 Stat. 2310, TS No. 540 (neutral state not required "to forbid or restrict the use on behalf of belligerents of telegraph or telephone cables or of wireless telegraphy apparatus" belonging to the neutral state or any of its private citizens or companies). These various provisions of international law evidence a clear "non-interference principle" for transnational communications.

specify the source or destination of offending private telecommunications that may be "cut off" under Article 19(2). Article 19(2) could not have intended for each State Party to have authority to cut off any telecommunications from any source to any destination in the world. For example, only those communications that originate in and/or are destined for locations in the United States are clearly within the jurisdiction of the United States to control.²⁹ Communications completely within a foreign country or between locations in two foreign countries would probably not be included in the exemption under Article 19(2), unless a basis for U.S. jurisdiction other than territoriality could be established.³⁰ Ambiguity in the scope of the exemption in Article 19(2) will have to be resolved on a case-by-case basis.

U.S. Telecommunications Law -- Section 502. Consistent with its treaty obligations under the Nairobi Convention and the 1979 Radio Regulations,³¹ U.S. law prohibits any person from willfully or knowingly violating "any rule, regulation, restriction, or condition made or imposed by any international radio or wire communication treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party" 47 U.S.C. § 502.³² Violations of international telecommunications law are thus made punishable as criminal offenses under U.S. law. As discussed above, however, a disruption of communications that falls within the exemption in Article 19(2) of the Malaga-Torremolinos and Nairobi Conventions would not violate applicable international telecommunications law, and would therefore not violate the provision in § 502 that compels compliance with international law. The fact that criminal sanctions may be imposed for a violation of § 502 points out the importance of correctly applying the exemption in Article 19(2) on a case-by-case basis.

Section 502 and FCC Regulations. Section 502 also prohibits any person from willfully or knowingly violating "any rule, regulation, restriction, or condition made or imposed by the Federal Communications Commission under authority of [Title 47, chapter 5]" Thus, a section 502 offense can be based on violation of (1) international law or (2) an FCC regulation.

²⁸ Such a disruption would have to be conducted from a location seaward of the territorial sea of another nation to avoid violation of article 19(2)(k) of the LOS Convention. *Supra*, note 27.

²⁹ See 47 U.S.C. § 152 (1992) (The provisions of this chapter shall apply to all . . . communication . . . and . . . transmission of energy by radio . . . which originates and/or is received within the United States.").

³⁰ *E.g.*, communications to or from U.S. flag vessels overseas or U.S. embassies. The more a particular disruption of communications involves intervention in a foreign state or in the activities of one of its authorized communications service providers, the less likely that Article 19(2) was intended to apply, even if the communications are contrary to U.S. interests.

³¹ Reprinted in S. TREATY DOC. NO. 97-21, 97th Cong., 1st Sess. (1981). The 1979 Radio Regulations derive their authority from the Malaga-Torremolinos Convention.

³² Sentences which may be imposed for a violation of § 502 appear in 47 U.S.C. § 501, including a fine of not more than \$10,000 and/or imprisonment for not more than one year, or two years for subsequent offenses.

FCC regulations, however, generally do not apply to U.S. government telecommunications facilities or stations.³³ The key statutory provisions authorizing FCC regulation of radio frequency emissions are 47 U.S.C. §§ 301 (licensure) and 303 (powers and duties of FCC). In accordance with 47 U.S.C. § 305(a), "radio stations"³⁴ owned and operated by the United States are not subject to sections 301 and 303. Government stations use frequencies assigned by the President,³⁵ and "any radio communication or signal relating to Government business" is not bound by FCC "rules and regulations designed to prevent interference with other radio stations and the rights of others."³⁶ "Government business" is not specifically defined, but national security and law enforcement activities are clearly within the traditionally recognized "business" of the United States. Accordingly, use of a hypothetical capability to disrupt certain telecommunications under Article 19(2) of the Malaga--Torremolinos and Nairobi Conventions should not result in criminal liability under either the international or domestic clause of 47 U.S.C. § 502. However, the exemption of government stations in section 305(a) should not be treated as *carte blanche* for disruption of any private communications regulated by FCC. Other laws and regulations apply.

The NTIA Manual. The President has delegated his authority over government communications under § 305(a) to the Assistant Secretary of Commerce for Communications and Information, Head of the National Telecommunications and Information Administration (NTIA). Under 47 U.S.C. § 902(b)(2)(K), the Assistant Secretary and NTIA are assigned "authority to establish policies concerning spectrum assignments and use by radio stations belonging to and operated by the United States." Under 47 U.S.C. § 904(a)(1), other federal agencies are required to "consult with the Assistant Secretary and NTIA to ensure that the conduct of telecommunications activities by such agencies is consistent with the policies developed under section 902(b)(2)(K)." NTIA's regulations for government communications are contained in the *Manual of Regulations and Procedures For Federal Radio*

³³ Government facilities and stations are regulated under the *Manual of Regulations and Procedures for Federal Radio Frequency Management* (the "National Telecommunications and Information Administration (NTIA) Manual"), issued by the Assistant Secretary of Commerce for Communications and Information pursuant to delegated authority under 47 U.S.C. § 902 and Executive Order 12046 of 27 Mar 78. See 47 C.F.R. § 300.

³⁴ "Radio station" is defined broadly in communications law as "a station equipped to engage in radio communication or radio transmission of energy." *E.g.*, 47 U.S.C. § 153(k) (1992).

³⁵ 47 U.S.C. § 305(a) (1992): "Radio stations belonging to and operated by the United States . . . shall use such frequencies as shall be assigned . . . by the president." The President's authority under this section has been delegated to the Assistant Secretary of Commerce for Communications and Information, Head of the National Telecommunications and Information Administration (NTIA). See 47 U.S.C. § 902 (1992).

³⁶ 47 U.S.C. § 305(a) (1992). The "government business" exception to FCC "harmful interference" regulations applies to all government stations, wherever located. "Stations on board naval and other Government vessels while at sea or beyond the limits of the continental United States" are not bound by FCC "harmful interference" regulations whether their signals relate to "government business" or not. *Id.*

Frequency Management (the "NTIA Manual"), dated 1 September 1995.³⁷ The NTIA Manual assigns government-allocated frequencies to government users and provides procedures for government use of non-government frequencies in emergencies.³⁸ Special rules apply to government use of non-government frequencies above 25 MHz for "tactical or training operations."³⁹ Finally, § 7.13 of the Manual provides that mobile stations of the armed forces, "when engaged in tactical operations, may employ any frequencies . . . provided they cause no interference with the authorized services operating on the frequencies selected." The NTIA Manual does contain war and emergency exceptions, but none of these exceptions would cover routine peacetime operations. Notwithstanding the apparently broad "government business" exception in 47 U.S.C. §305(a), a non-interference principle is clearly manifest in NTIA regulations (and FCC regulations adopted by reference in the NTIA Manual). The NTIA Manual specifically limits government use of or interference with privately licensed frequencies.

Section 606 Emergency Powers. Special war and emergency powers granted to the President in 47 U.S.C. § 606 suggest that government interference with private communications and facilities in the U.S. for national security purposes is limited to the conditions stated in § 606. Under § 606(a), the President may direct that national defense communications be given precedence or priority over other communications while the U.S. is engaged in war. Additionally, the President may suspend or amend FCC rules and regulations, and may close, use or control particular facilities or devices capable of emitting electromagnetic radiations, but these powers apply only to stations and devices capable of use as navigation aids, only upon Presidential proclamation of war, threat of war, state of public peril, disaster or other

³⁷ The NTIA Manual is incorporated into federal regulations by reference in 47 C.F.R. § 300.1.

³⁸ See NTIA Manual, §§ 7.3.4, 7.12. In emergencies short of war, government use of non-government frequencies is subject to the consent of the licensee; operations must be conducted in accordance with FCC Rules and Regulations; and such use "shall be subject to immediate termination if harmful interference is caused to the service rendered by non-Government stations."

³⁹ NTIA Manual, § 7.15.3. Coordination with FCC is required; government frequencies must be inadequate to meet the tactical or training requirement; use of non-government frequencies "shall cause no harmful interference to non-Government assignments;" "military operations shall be terminated immediately upon notification that harmful interference has occurred;" and military tactical and training assignments in non-Governmental frequencies must accept any interference caused by non-Government assignments. With respect to coordination with FCC, 47 C.F.R. §2.103 provides that government stations may use non-government frequencies if the FCC finds that such use is necessary for the coordination of government and non-government activities, but such operation by the government "shall be in accordance with Commission rules governing the service to which the frequencies involved are allocated;" "such operations shall not cause harmful interference to non-Government stations and, should harmful interference result, . . . the interfering Government operation shall immediately terminate;" and non-Government licensees must certify in writing that government operation is necessary (*i.e.*, consent of the frequency licensee is required).

national emergency, and "just compensation" must be provided to the owners.⁴⁰ In view of these provisions, the government exemption in section 305(a) seems to be based upon an assumption of normal communications by government installations, and not purposeful interdiction activities on frequencies licensed by FCC to private telecommunications providers.

Sections 333 and 1367 -- Prohibiting Willful Interference. A more recent enactment, 47 U.S.C. § 333,⁴¹ provides criminal penalties for interference with U.S. communications licensees, stating that "No person shall willfully or maliciously interfere with or cause interference to any radio communication of any station licensed or authorized by or under this chapter [*i.e.*, stations licensed by FCC, under provisions of Title 47, chapter 5, U.S. Code] or operated by the United States Government."⁴² Legislative history for this provision explains that it "prohibits intentional jamming, deliberate transmission on top of the transmissions of authorized operators already using specific frequencies in order to obstruct their communications, repeated interruptions, and the use and transmission of whistles, tapes, records, or other types of noise making devices to interfere with the communications or radio signals of other stations."⁴³ The law was intended to "elevat[e] the gravity of such violations" and to "increase public awareness of the prohibition against this particularly disruptive type of violation."⁴⁴ However, section 333 and its legislative history do not specifically state whether the statute was intended to apply to the disruption of private telecommunications by U.S. government operations.⁴⁵ However, other criminal laws clearly protect private telecommunications from government interference, unless properly authorized by a warrant or under emergency circumstances. For example, 50 U.S.C. § 1809 provides criminal penalties⁴⁶ for intentional, warrantless interception of

⁴⁰ 47 U.S.C. § 606(c) (1992). Section 606(d) contains similar provisions for wire communications and facilities.

⁴¹ Part of the Federal Communications Commission Authorization Act of 1990, P.L. 101-396, 104 Stat. 848.

⁴² Sentences which may be imposed for a violation of § 333 appear in 47 U.S.C. § 501 (1992), including a fine of not more than \$10,000 and/or imprisonment for not more than one year, or two years for subsequent offenses.

⁴³ H. R. REP. No. 101-316, 101st Cong., 1st Sess., Oct. 27, 1989, at p. 8, *reprinted in* 1990 U.S.C.C.A.N. 1294.

⁴⁴ *Id.*, at 9.

⁴⁵ 18 U.S.C. § 1362 (1992) also provides criminal penalties for interference with communications, but it protects only U.S. government facilities and those "used or intended to be used for military or civil defense functions." See H. R. REP. No. 965, Aug. 17, 1961, *reprinted in* 1961 U.S.C.C.A.N. 2997, at 2999 (discussing the limitation of section 1362 to government-operated facilities). Because section 1362 protects only government communications, it would not apply to government operations against other communications.

⁴⁶ Authorized punishments include a fine of not more than \$10,000 or imprisonment for not more than five years, or both. Additionally, 50 U.S.C. § 1810 authorizes civil suits for damages.

electronic communications sent by or intended to be received by a U.S. person in the United States.⁴⁷ Section 1809(d) clarifies that this provision was intended to apply to government action by specifying that "There is federal jurisdiction over an offense under this section if the person committing the offense was an officer or employee of the United States." Additionally, section 1809(b) provides that it shall be a defense to prosecution of law enforcement or investigating officers that electronic surveillance was conducted pursuant to a search warrant or court order. Similarly, 18 U.S.C. §§ 2510 *et. seq.*, the Electronic Communications Privacy Act (ECPA), protects private communications within the United States⁴⁸ from government interception. The ECPA provides criminal penalties for any "person" who violates any of the various prohibitions in § 2511. "Person" is defined in § 2510 as "any employee, or agent of the United States or any State or political subdivision thereof."⁴⁹ Government interceptions may be authorized under ECPA, but only by judicial order, subject to requirements under §§ 2516 and 2518 which are much more stringent than the requirements for an ordinary warrant.⁵⁰ Finally, 18 U.S.C. §1367 provides criminal penalties for anyone who "intentionally interferes with the authorized operation of a communications . . . satellite or obstructs or hinders any satellite transmission." Section 1367(b) contains law enforcement and intelligence exceptions, like the wiretapping laws, but it contains no national security exception for signal interdiction.

Precedents For Termination of Telecommunications Services. There are two previous examples of provisions for the termination of telecommunications services to private subscribers on the basis of government belief that such services are being used for criminal activity. One is codified at 18 U.S.C. § 1084 (transmission of wagering information)⁵¹ and the other

⁴⁷ 50 U.S.C. § 1805(e) (1992) does provide an emergency exception to the warrant requirement for foreign intelligence information, but approval of the Attorney General is required, and application for a warrant must follow within twenty-four hours. Disruption of telecommunications and wiretapping both raise Fourth Amendment privacy concerns, but the law applicable to intelligence collection does not apply in detail to the distinct activity of disrupting telecommunications. This paper deals primarily with disruption or interdiction of telecommunications, not surreptitious eavesdropping or wiretapping to monitor or record communicative contents. Additional information about the Foreign Intelligence Surveillance Act (FISA) and COMINT/SIGINT activities can be found in DEFENSE INTELLIGENCE AGENCY, INTELLIGENCE LAW HANDBOOK, CC-0000-181-95, Sept. 1995.

⁴⁸ ECPA does not apply extraterritorially.

⁴⁹ Remedies for violations of ECPA include criminal sanctions under § 2511(4) and (5), and civil damages under § 2520.

⁵⁰ 18 U.S.C. § 2518(7)(a) (1992) does contain an emergency exception for *specifically designated law enforcement officers*, applicable to circumstances involving "immediate danger of death or serious physical injury," or "conspiratorial activities" that are characteristic of organized crime or that threaten national security. However, section 2518(7)(b) states that grounds must exist under the ECPA for a warrant and an application for a warrant must be filed within forty-eight hours. If the application for a warrant is then denied (or was not filed), the emergency interception will be treated as a violation of ECPA.

⁵¹ 18 U.S.C. § 1084(d) provides:

appeared in the Senate version of the 1989 FCC Authorization Act, but was not enacted (use of mobile phone services in drug transactions).⁵² Both provisions address action initiated by law enforcement officials, with termination of communications services to be accomplished by the communications service providers (not through direct government-user interdiction). Both provisions require advance notice of termination from the communications service provider to the user, and both specifically relieve the provider of legal liability to the user for termination of services (indicating that liability might otherwise exist for wrongful termination). These common elements in the two provisions reflect (1) the fundamental law enforcement character of disrupting crime-related communications, (2) the fact that communications service providers have rights in communications systems and their contracts to provide communications services,⁵³ and (3) that the user has at least some minimal due process right in the continuation of communications services.⁵⁴ The provision

When any *common carrier*, subject to the jurisdiction of the Federal Communications Commission, is *notified in writing* by a Federal, State, or local *law enforcement agency*, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State, or local law, it shall discontinue or refuse the leasing, furnishing, or maintaining of such facility, after reasonable *notice to the subscriber*, but *no damages* penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. (Emphasis added).

⁵² S. REP. 101-215, 101st Cong., 1st Sess. (1989), at 7-8 and 16. The Senate provision on mobile phones was crafted as the result of communications the previous year (1988) between the Chairman of the Senate Committee on Commerce, Science and Transportation and the FCC. The section proposed in the 1989 Authorization Act provided as follows:

When any public or private mobile radio services licensee is notified in writing by a Federal, State or local *law enforcement agency*, acting within its jurisdiction, that such agency has obtained a *judicial determination* that there is *probable cause* to believe that a mobile radio unit is being used by any individual for the purpose of transmitting or receiving information in connection with the manufacture, distribution, importation, exportation, or sale of a controlled substance in violation of Federal, State, or local law, the *licensee shall*, after reasonable *notice to the subscriber*, discontinue service to the mobile radio unit being used by such individual. The *licensee shall not be subject to damages* or to any civil or criminal penalty or forfeiture for discontinuing such service. (Emphasis added).

⁵³ In the case of radiofrequency communications, the communications service provider is a licensee of the particular frequencies being used to provide services.

⁵⁴ As stated in the leading case on termination of telephone services under 18 U.S.C. § 1084(d) (1992), *Telephone News System v. Illinois Bell Telephone*, 220 F.Supp. 621, 625-26 (N.D.Ill. 1963), *aff'd per curiam* 376 U.S. 782 (1964), "The fifth amendment forbids the taking of property without due process of law. It seems probable that one's right to telephone service is a property right within the protection of this amendment, inasmuch as under the common law and most utility statutes a public utility must serve all members of the public without unreasonable discrimination." See 47 U.S.C. § 11 (1992) (telegraph), § 202 (common carriers of communications services); *Andrews v. Chesapeake & Potomac Tel. Co.*, 83 F.Supp. 966 (D.D.C. 1949); *Fay v. Miller*, 87 U.S.App.D.C. 168, 183 F.2d 986 (1950). However, it has

proposed by FCC in 1989 that would have allowed termination of mobile phone service for drug-related transactions went further by requiring the government to obtain the equivalent of a Fourth Amendment search warrant (a judicial determination of probable cause was required).

Telecommunications Law -- Conclusion. Domestic telecommunications law clearly evidences a non-interference principle with respect to signals that originate in or are received in the United States. Although NCA must consider the impact of domestic telecommunications law on a case-by-case basis, it is unlikely that military forces will be authorized to conduct EA operations against private telecommunications that originate in or are destined for the United States except in an emergency. Peacetime disruption of signals which are entirely extraterritorial may also be prohibited under U.S. law and regulations, including section 502, section 333 and the NTIA Manual. Peacetime disruption of entirely extraterritorial telecommunications is probably also prohibited by international telecommunications law (and therefore by section 502), because such signals are not likely to be viewed as subject to the exception in Article 19(2) of the international telecommunications conventions.

long been held that the customer's right to service from a public utility is conditioned upon his lawful use of the service. See, e.g., *Bryant v. Western Union Tel. Co.*, 17 F. 825 (D.Ky. 1883); *Godwin v. Carolina Tel. & Tel. Co.*, 136 N.C. 258, 48 S.E. 636 (1904); *Bachelder, The Suppression of Bookie Gambling by a Denial of Telephone and Telegraph Facilities*, 40 J. CRIM. L., C. & P.S. 176, 179 (1949). The utility has a right to withdraw service to prevent illegal use of its facilities, *McBride v. Western Union Tel. Co.*, 171 F.2d 1 (9th Cir. 1948), and some courts have spoken of a duty on the part of the utility to do so, see, e.g., *Hamilton v. Western Union Tel. Co.*, 34 F.Supp. 928, 929 (N.D. Ohio 1940); *Andrews v. Chesapeake & Potomac Tel. Co.*, 83 F.Supp. 966, 968 (D.D.C. 1949). The practice in a number of states has long been that the utility discontinues service upon notification by the police that the service is being illegally used, and the police then present their evidence, on behalf of the company, in any proceeding brought by the customer to restore service or prevent threatened discontinuance. *Bachelder, supra* at 180-81. In the *Telephone News Systems* case, *supra*, the Court noted that Western Union, AT&T, and the Bell System companies all had tariff provisions that service would not be furnished if a law enforcement agency advised that the service was being used in violation of law, or if the company received other evidence that the service would be so used. See *Bachelder, supra* at 178-79. In *McBride v. Western Union Telegraph Co.*, 171 F.2d 1 (9th Cir. 1948), the court held that the company, under such a tariff provision, could discontinue service, upon notification by a law enforcement officer of illegal use, and that the notifying officers need not supply the company with their evidence of illegal use before discontinuation would be justified. See, *contra*, *Andrews v. Chesapeake & Potomac Tel. Co.*, 83 F.Supp. 966, 968-969 (D.D.C. 1949)(dictum). Additionally, in *People ex rel. Restmeyer v. New York Tel. Co.*, 173 App.Div. 132, 159 N.Y.S. 369 (1916), the court stated: "It is certainly not an unlawful or oppressive use of police power to interrupt telephone service by arrangement between the police and the telephone company in a case where the telephone is being used, as it was in this case, to carry on a criminal business." 159 N.Y.S. at 370. Accord, *Fay v. Miller, supra*. Where the customer brings a proceeding to restrain discontinuation, the communications carrier has the burden of establishing illegal use by a preponderance of the evidence. This procedure has been upheld on the ground that the action is not a criminal proceeding to punish the customer for past acts, but is an attempt by the company to prevent future improper use (as indicated by past use) of its property. See, e.g., *In re DiBenedetto*, 83 N.Y.S.2d 920 (Sup.Ct. 1948); *People ex rel. Restmeyer v. New York Tel. Co., supra*. The Court in *Telephone News Systems, supra*, observed that Congress wrote subsection (d) into section 1084 in order to accomplish the aim of curtailing illegal use of wire communications.

U.S. Constitutional Law.

(1) Use of privately-allocated portions of the electromagnetic spectrum by licensees is becoming increasingly analogous to a property right,⁵⁵ potentially subject to many of the legal protections accorded tangible private property. Although limited interference with (or "trespass" upon) the property of another in peacetime may be justified while exercising the right of self-defense,⁵⁶ the domestic legal regime developing with respect to private telecommunications has established a clear non-interference principle as the norm in peacetime, with narrowly tailored exceptions.

(2) Intentional government disruption of communications without "acquiring" the contents of the communications could be viewed as a "seizure" under the Fourth Amendment, although no case could be found in which a federal court has specifically addressed this question. Numerous precedents point to such a result. For example, the Supreme Court has held repeatedly that the Fourth Amendment protects people, not places, from government intrusions into legitimate expectations of privacy.⁵⁷ Accordingly, the ambit of the Fourth Amendment is not limited to physical trespasses upon the property or premises of another to conduct a search or seizure.⁵⁸

Whether communications services are property rights or not, the Supreme Court has held that property rights are not the sole measure of the Fourth Amendment's protections.⁵⁹ The Court has held that the Fourth Amendment applies to the seizure of intangible as well as tangible interests, specifically finding that conversations are "things" that may be "seized."⁶⁰ The Fourth Amendment is not limited to seizures of things as the fruit of law enforcement

⁵⁵ THE OMNIBUS BUDGET RECONCILIATION ACT OF 1993, P.L. 103-66, 103d Cong., 1st Sess., §§ 6001-6002, instituted a program to auction licenses for the use of available radio frequencies. As noted in the NEW YORK TIMES, "Though they are intangible, the radio frequencies are in many respects a form of real estate. Like a patch of prime property in midtown Manhattan, radio frequencies are in scarce supply because the most desirable ones have already been licensed. And, like real estate, licenses to use the airwaves are routinely bought and sold in a market that totals tens of billions of dollars." Edmund L. Andrews, *Radio Rights: A Move to Auction Licenses that Sell*, N.Y. TIMES, sec. 4, p. 6, col. 1, Mar. 21, 1993. The Courts, however, have not yet accorded FCC licenses the same treatment as traditional property. See *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945); *American Broadcasting Co. v. Federal Communications Commission*, 191 F.2d 492 (D.C.App. 1951).

⁵⁶ On the defense of "public necessity" see W. PAGE KEETON, ET AL, EDS., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984), at 145-48.

⁵⁷ E.g., *Katz v. United States*, 389 U.S. 347 (1967) (electronic "bugging" of public telephone booth, although apparently undertaken upon a "strong probability" that Katz was using the telephone in violation of federal law, was an unconstitutional search because the agents had not first obtained a search warrant); *United States v. Chadwick*, 433 U.S. 1 (1977).

⁵⁸ E.g., *Katz*, *supra* note 57; *Warden v. Hayden*, 387 U.S. 294, 304 (1967).

⁵⁹ See *Soldal v. Cook County*, 506 U.S. 56, 64 (1992).

⁶⁰ E.g., *Berger v. New York*, 388 U.S. 41 (1967).

searches; the Amendment protects against unreasonable searches and, separately, seizures.⁶¹ A "seizure" within the meaning of the Fourth Amendment may occur even if the government does not physically convert possession of a thing or its contents.⁶² Government interception of the communicative contents of private telecommunications has been held repeatedly to fall within the Fourth Amendment.⁶³ Current case law points to a strong probability that government disruption or termination of live communications, even without awareness of the contents, would also be found to fall within the Fourth Amendment. The key point is not government conversion or possession of a thing protected by the Fourth Amendment, but government interference with another's possession or use of it. Moreover, the government has already asserted that "private communications lie at the core of the Fourth Amendment," and that the lawfulness of a search or seizure of communications under the Fourth Amendment should turn on whether or not a warrant has been obtained.⁶⁴

(3) Fourth Amendment restrictions on government disruption of private telecommunications would protect only those communications from or to persons entitled to the protections of the U.S. Constitution. Entirely extraterritorial signals not involving U.S. persons would not be protected.⁶⁵ Application of Fourth Amendment protections to disruption of private telecommunications would not immunize such communications from U.S. national security efforts; rather, law enforcement officials would be required

⁶¹ *E.g.*, *United States v. Jacobsen*, 466 U.S. 109, 120-25 (1984) (cocaine powder destroyed during testing as a "seizure"); *Soldal v. Cook County*, 506 U.S. 56, 62-66 (1992) (wrongful repossession of mobile home -- as distinguished from "searches," the Fourth Amendment protects against "seizures" of property even where privacy or liberty interests are not affected); *Bonds v. Cox*, 20 F.3d 697, 702 (6th Cir. 1994) (breaking of doors and putting holes in walls during search as a "seizure" apart from any contraband also seized as evidence); *Leshner v. Reed*, 12 F.3d 148 (8th Cir. 1994) (seizure of police dog from its handler); *Snyder v. Rodgers*, 1995 U.S. Dist. LEXIS 19302 (W.D. Mich. 1995) (42 U.S.C. § 1983 claim for seizure of dogs) (1992).

⁶² *See, e.g.*, *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (a "seizure" occurs when "there is some meaningful interference with an individual's possessory interests . . ."); *Maryland v. Macon*, 472 U.S. 463 (1985); *Bonds v. Cox*, 20 F.3d 697, 702 (6th Cir. 1994) (damage to home during search as a "seizure"). *Cf. Terry v. Ohio*, 392 U.S. 1, 16 (1968) ("seizure" of a person occurs whenever there is meaningful interference, however brief, with an individual's freedom of movement). *Jacobsen* and other cases have extended the reasoning of *Terry* to "seizures" of property and other interests.

⁶³ *E.g.*, *United States v. United States District Court*, 407 U.S. 297, 312-313 (1972) (domestic security wiretapping). *See also* 18 U.S.C. § 2510(4) (1992) (Electronic Communications Privacy Act) ("'intercept' means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device."); 50 U.S.C. § 1801(f) (1992) (Foreign Intelligence Surveillance Act) ("'electronic surveillance' means -- the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication . . .").

⁶⁴ *United States v. Chadwick*, 433 U.S. 1, 7 (1977).

⁶⁵ *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

under ordinary circumstances to obtain a warrant before terminating or seizing such communications.

Posse Comitatus and Section 375.

(1) The Posse Comitatus Act, 18 U.S.C. § 1385, prohibits use of the Army and Air Force "as a posse comitatus or otherwise to execute the laws." The Posse Comitatus Act has been applied to the Navy and Marine Corps as a matter of DoD policy.⁶⁶ The key principle in the Posse Comitatus Act is prohibition of direct military involvement in activity of a law enforcement character, unless another law provides a specific exception to allow such involvement. 10 U.S.C. § 375 contains another statutory restriction against military participation in "a search, seizure, arrest, or other similar activity." Section 375 specifically includes the Navy and Marine Corps.

(2) The applicability of the Posse Comitatus Act does not depend on a finding that intentional disruption or deprivation of telecommunications is technically a "seizure" within the meaning of the Fourth Amendment. The Posse Comitatus Act applies to any activity by military personnel, not otherwise authorized by law, that subjects individuals to the exercise of military power which is regulatory (*i.e.*, controlling or directing), proscriptive (*i.e.*, prohibiting or condemning) or compulsory (*i.e.*, exerting some coercive force).⁶⁷ The DoD Directive that governs assistance to law enforcement, and implementing Service regulations, also interpret the Posse Comitatus Act as including "activity that is likely to subject civilians to use [of] military power that is regulatory, proscriptive, or compulsory."⁶⁸ Military interdiction of private telecommunications fits easily within the prohibited category of "regulatory, proscriptive or compulsory" activity.

(3) Statutory exceptions to the Posse Comitatus Act do exist, and certain peripheral DoD activities in support of law enforcement authorities may be found not to constitute prohibited direct involvement in law enforcement. Whether particular proposals for DoD assistance to law enforcement fall within one of the permissible categories must be considered on a case-by-case basis under applicable regulations.⁶⁹ The permissible categories most likely to apply

⁶⁶ DOD DIRECTIVE 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials*, Jan. 15, 1986, enclosure (4), par. C; SECRETARY OF THE NAVY, INSTRUCTION 5820.7B, *Cooperation with Civilian Law Enforcement Officials*, Mar. 28, 1988, par. 9a, 9c.

⁶⁷ *United States v. Yunis*, 681 F. Supp. 891, 895-6 (D.D.C. 1988) (defining "regulatory," "proscriptive," "compulsory"). See, e.g., *United States v. Kahn*, 35 F.3d 426, 431 (9th Cir. 1994). See also *United States v. McArthur*, 419 F. Supp. 186 (D.N.D. 1975); *United States v. Casper*, 541 F.2d 1274 (8th Cir. 1976), *cert. denied*, 30 U.S. 970 (1977); *United States v. Gerena*, 619 F. Supp. 1179 (D. Conn. 1986). Cf. *Laird v. Tatum*, 408 U.S. 1, 11, 15-16 (1972).

⁶⁸ DOD DIRECTIVE 5525.5, *supra* note 66, enclosure (4), par. C2. See also SECNAVINST 5820.7B, par. 9c(2); DEPARTMENT OF ARMY REGULATION 500-51, July 1, 1983, par. 3-10.

⁶⁹ Posse Comitatus exceptions and coordination requirements are detailed in DOD DIRECTIVE 5525.5; CJCS INSTRUCTION 3710.01, *Delegation of Authority for Approving Operational Support*

to peacetime use of military equipment to disrupt telecommunications include (a) the authority to lend equipment to law enforcement agencies under 10 U.S.C. § 372,⁷⁰ and (b) self-defense of DoD personnel and equipment.⁷¹ Constitutional emergency exceptions are discussed in enclosure (4) of DoD Directive 5525.5, but these exceptions apply only to *in extremis* situations where immediate action is required to preserve public order.

(4) Whether the Posse Comitatus Act and 10 U.S.C. § 375 apply extraterritorially is still an open question. In an opinion dated 3 November 1989, Assistant Attorney General William P. Barr concluded that the Posse Comitatus Act and 10 U.S.C. § 375 do not apply extraterritorially, leaving the military free to participate directly in law enforcement activities outside the United States.⁷² Federal courts which have considered the issue have also found the Posse Comitatus Act inapplicable extraterritorially.⁷³ However, at least one court has indicated that 10 U.S.C. § 375 does apply extraterritorially, and no cases could be found which hold otherwise.⁷⁴ The Legal Policy Adviser to the Deputy Assistant Secretary of Defense (Drug Enforcement Policy and Support) held the view that the Posse Comitatus Act does not apply extraterritorially, but 10 U.S.C. § 375 does.⁷⁵ The issue of extraterritorial application of the Posse Comitatus Act and 10 U.S.C. § 375 must be decided on a case-by-case basis by the Secretary of Defense or Deputy Secretary of Defense, in accordance with paragraph I of DoD Directive 5525.5. Paragraph I was added to DoD Directive 5525.5 by formal change notice two weeks after the Barr Opinion was issued in 1989. The change to the DoD directive states that exceptions to general DoD policy against direct military participation in law enforcement outside the United States will be granted on a case-by-case basis by SECDEF or DEPSECDEF, and "only when there are compelling and extraordinary circumstances."

to Drug Law Enforcement Agencies and Counterdrug-Related Deployment of DoD Personnel, May 28, 1993; and SECNAVINST 5820.7B.

⁷⁰ See DOD DIRECTIVE 5525.5, *supra* note 66, enclosure (3). Under 10 U.S.C. § 373 (1992), military personnel may train law enforcement officials in the use of equipment loaned under § 372. See DOD DIRECTIVE 5525.5, *supra* note 66, enclosure (4), par. A4.

⁷¹ See DOD DIRECTIVE 5525.5, *supra* note 66, enclosure (4), par. A2a(5); CJCS INSTRUCTION 3121.01, *Standing Rules of Engagement for U.S. Forces*, *supra*, note 6.

⁷² U.S. DEPT. OF JUSTICE, OFFICE OF LEGAL COUNSEL, *Memorandum for Brent Scowcroft (Extraterritorial Effect of the Posse Comitatus Act)*, Nov. 3, 1989.

⁷³ See, e.g., *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949) (U.S. citizen indicted for treason was arrested by the Army in Germany; Posse Comitatus Act held not applicable).

⁷⁴ *United States v. Fahn*, 35 F.3d 416, 431 n.6 (9th Cir. 1994) (restrictions on military involvement in civilian law enforcement operations do extend to activities outside the United States).

⁷⁵ Telephone Interview, NJAG 10.2 (CDR Scott)/DASD(DEP&S)(LPA) with COL McAtamney of (May 7, 1996).

(5) The Posse Comitatus Act, 10 U.S.C. § 375, and DoD implementing regulations would generally prohibit military disruption of telecommunications from or to U.S. persons in the United States as a "regulatory, proscriptive or compulsory" activity.⁷⁶ Such activity may be permitted extraterritorially under extraordinary circumstances, but approval by SECDEF or DEPSECDEF is required, and restrictions in other applicable laws may still prevent authorization.

(6) Under emergency circumstances, military forces may always take prompt and vigorous action to prevent loss of life or destruction of property within the protection of the United States.⁷⁶ Thus, for example, military forces could disrupt telecommunications signals that were part of an imminent terrorist attack, such as signals intended to detonate explosives or to order the commencement of an attack. This emergency authority would not reach to the harassment or interdiction of ordinary criminal activity within the jurisdiction of law enforcement authorities.

Conclusion. Military equipment intended to disrupt or terminate telecommunications may be developed, procured and fielded, consistent with the legal obligations of the United States. Such equipment and tactics may be used during armed conflict,⁷⁷ in accordance with the well settled limitations imposed on all weapons and tactics by the traditional law of armed conflict. However, peacetime use of such equipment not in self-defense must be approved by NCA on a case-by-case basis after review of a proposal submitted in accordance with the Appendix to CJCSI 3210.03. Such proposals should include sufficient information to support NCA consideration of the factors discussed above -- applicable principles in the Standing Rules of Engagement, the existence of any external source of authority (such as host nation consent or a U.N. Security Council resolution), provisions of international and domestic telecommunications law that might apply to the particular proposal, and the applicability of the Fourth Amendment, Posse Comitatus Act and 10 U.S.C. § 375. The nationality and location of the sender and recipient of target telecommunications, the basis upon which particular telecommunications were selected for targeting, the location from which intended disruption operations will be conducted, and the goal expected to be achieved by disrupting particular

⁷⁶ See DOD DIRECTIVE 5525.5, *supra* note 66, enclosure (4), par. A2c (1).

⁷⁷ The potential impact of telecommunications treaties on plans to disrupt enemy telecommunications *during armed conflict* has not been discussed in this memorandum because treaties inconsistent with a state of armed conflict are normally suspended during armed conflict. Historically, all treaty obligations between belligerents were suspended upon the outbreak of war. 2 L. OPPENHEIM INTERNATIONAL LAW: A TREATISE 302 (H. Lauterpacht, ed., 7th ed. 1952). Under current international law practice, however, the compatibility of particular treaties with a state of armed conflict is assessed on a case-by-case basis. D. P. O'Connell, 1 International Law 268 (2d ed. 1970); RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES § 336, Reporter's Notes, 221-22 (1986); *Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185 (C.A. 1920), *cert. denied*, 254 U.S. 643 (1920). With respect to belligerent telecommunications, treaty obligations would probably be suspended during armed conflict; with respect to neutral telecommunications, however, the obligations in the international telecommunications conventions and implementing regulations would most likely continue during armed conflict.

telecommunications will be key factors in the legal analysis of individual proposals. Military use of equipment designed to disrupt telecommunications will most likely be limited to situations involving traditional armed conflict, self-defense, and enforcement of U.N. sanctions. Under unique circumstances where disruption of suspected criminal telecommunications is preferred to interception of the contents of such communications for use as evidence, requests for loans of special equipment to civilian law enforcement agencies could also be supported.

The Coastal Fishing Vessel Exemption From Capture and Targeting: An Example and Analysis of the Origin and Evolution of Customary International Law

Major Ronald S. McClain*

I. INTRODUCTION

This article will show how customary rules of armed conflict pertaining to the coastal fishing vessel exemption from capture and targeting have evolved over nearly six centuries of state practice. This topic is inextricably interwoven with the law of naval blockade, and as such the exemption from capture has to be evaluated in light of the changes concerning blockade warfare. Thus a number of influences on the rules related to blockade will be reviewed, but only to the extent necessary to explain the plausible rationale for the changes in state practice related to this topic.

Looking at this evolution is important for a number of reasons. First, examining the process of customary law evolution provides an insight into how daily military operations either reinforce existing norms or create new norms. Second, recent world events have lead to a shift in our naval forces operational emphasis away from its traditional blue-water focus to a more contemporary mission.¹ As our maritime focus shifts from the open ocean to the littoral regions of the world, our armed forces will increasingly be confronted with the complexities of operating in this densely trafficked in-shore area. Therefore, it is important to understand the existing international law framework they will be operating under.

II. ORIGINS OF THE EXEMPTION: WHERE DOES CUSTOMARY LAW COME FROM?

The current status of customary international law is determined by looking at state practice, or what states do and say. The practice of one state, acting unilaterally, can begin the process of creating a customary norm; but as Justice Story pointed out:

[N]o single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the consent of civilized

* The author is an active duty Marine Corps officer presently serving in the office of the Staff Judge Advocate, United States Central Command, MacDill Air Force Base, Florida.

¹ This change in focus to the littoral regions is outlined in the Department of the Navy publications, *Forward . . . From the Sea* (Nov. 1994), and CONCEPT AND ISSUES 95, *A Certain Force* . . . , 1-4 (1995) and CONCEPTS AND ISSUES 96, at 46 (1996).

communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct.²

It should be initially pointed out that rules of customary international law which often become codified, are not immutably "etched in stone," but are subject to change, and evolve by further state practice. Customary law, evolving from uniform and constant usage, is slow in the making and, as a result, often does not readily meet the economical and political needs of an ever-changing society of states.³ It is often said that the law lags behind societal realities because it is slow to change. In the military context, this perception is furthered by the rapid changes in technology that dramatically affect the environment in which our armed forces operate. Nevertheless, a review of the past provides a clue to the future, or as Justice Jennings of the International Court of Justice observed, "Contemporary international law cannot be fully understood unless it is seen in the perspective of the passage of time and of the changes which go with it."⁴

Whenever a discussion of international law occurs, the discourse often focuses not so much on the rule as it does on the origin of the rule. It may be true that many rules of customary international law have ultimately been codified by conventions or treaties. Still, most rules arise out of state practice which over time gain wide acceptance by states. Those states then believe that they have an obligation to comport their respective state actions with these "rules." This sense of obligation, or *opinio juris*, may eventually become widespread enough to become a *jus cogens* norm.⁵

While customary international law and *jus cogens* are related, they differ in one important respect. Customary international law rests on the consent of states.⁶ Additionally, a state that persistently objects to a norm of customary international law that other states accept is not bound by that norm.⁷

² The Scotia, 14 Wall. 170, 187-188.

³ BURDICK H. BRITTIN, INTERNATIONAL LAW FOR SEAGOING OFFICERS 299 (5th ed. 1986).

⁴ Jennings, *Introduction*, in DUFOR, HAGENMACHER & TOMAN, GROTIUS ET LORDRE JURIDIQUE INTERNATIONAL 35-36 (Lausanne: Payot Lausanne, 1985).

⁵ *Jus cogens* is defined at Article 53 of the Vienna Convention on the Law of Treaties, as a norm accepted and recognized by the international community of states, as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. 1155 UNTS 332, 8 I.L.M. 679 (May 23, 1969).

⁶ Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 Yale J. Intl. L. 332, 351 (1988).

⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, sec. 310 comment (d) (1988).

In contrast, *jus cogens* "embraces customary laws considered binding on all nations . . . derived from values taken to be fundamental by the international community."⁸ Therefore, *jus cogens* norms will be binding on all states and no lawful derogation from the norm would be permitted. Initially, I will address the coastal fishing vessel exemption as a custom. Then, I will address the issue of whether the coastal fishing vessel exemption has reached the status of a *jus cogens* norm.

One important aspect to note is the fact that there are times when some nations will not follow rules which are established norms, even if they have done so previously. In this sense Professor Hall's words seem almost prophetic when he commented that "grave doubt is felt whether even old and established dictates will be obeyed when the highest interests of nations are at play."⁹ Thus, states may follow the exemption most of the time out of self interest, but there are times when they may believe their self-interest is better served by a departure from the rules.

A. State Practice

State practice, coupled with *opinio juris*, can ultimately establish a customary international law norm. This norm, which is not expressly stated in any conventions or other document, may nonetheless bind countries which have not in the past acquiesced to the rules. Often it is difficult to explain to a lay person what customary international law is. There is no written international rule to point to in support of your contention that certain actions are or are not permissible. Precedents such as the *S.S. Lotus*¹⁰ case, which essentially held that in international law that which is not prohibited is permitted, leads to the skeptics' challenge of "show me where it says my action is prohibited?"

Where do we look to find what customary international law is? The Statute of the International Court of Justice (ICJ) makes it easy for us by listing the sources which the Court looks to in deciding international law disputes.¹¹ Given the sources listed by the ICJ statute, we can therefore take a

⁸ Klein, at 350-351. This concept is exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II. See Note, *The Nuremberg Legacy, An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 868 (1990).

⁹ W. E. HALL, TREATISE ON INTERNATIONAL LAW, IX (4th ed. 1895).

¹⁰ The *S. S. Lotus*, (France v. Turkey) P.C.I.J., Ser. A, No. 10 (1927). Restrictions upon the independence of States cannot therefore be presumed.

¹¹ STATUTE OF THE I.C.J., Article 38, U.N.Y.B. 1334 (1983).

Article 38 provides:

1. The Court [in exercising its function to decide disputes in accordance with international law] shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states.

historical look at state practice. This allows an assessment of the evolution of the coastal fishing vessel exception from its inception. It will also us to look at the modifications and adjustments state practice to account for the historical practicalities of a given situation. This trek through historical state practice provides an example of how customary international law develops, how it changes, and how it is influenced by the actions or acquiescence that take place in day-to-day military operations.

1. Early State Practice

We begin our assessment of the origin of the coastal fishing vessel exception as a custom evidenced in scholarly writings. The doctrine that coastal fishing vessels are exempt from capture or targeting is by no means modern.

As early as 1406, the King of England passed a Royal Order concerning the safety of fisherman.¹² The provisions of the Royal Order provided a qualified exemption. In essence, fishermen would not be interfered with as long as they did not undertake anything that might work to the prejudice of England. This provision was undoubtedly aimed at preventing spying and smuggling. The Royal Order is also significant in the scope of its exemption. It allowed foreign vessels to "sail about" and "linger" anywhere upon the sea.¹³ This broad approach to all fishing vessels, not just coastal fishing vessels, may have been peculiar to the fact that open-ocean fishing had not yet become a common practice. Additionally, it should be noted that the King did not feel any compelling obligation forced him to provide this

-
- b. international custom, as evidence of a general practice accepted by law;
 - c. the general principles of law recognized by civilized nations;
 - d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

¹² 8 RYMERS FOEDERA (vol.VIII, at 451). The King to each and every admiral, greeting: Be it known, that for various reasons, we being for the present so inclined, have undertaken and by these presents do establish and decree that under our protection and safe conduct and under our particular charge and care, each and all of the fisherman of France, Flanders and Brittany, together with their boats and fishing tackle, may, but only for the purpose of carrying on their fishing, freely and lawfully sail about and travel back and forth and may fish, drift and linger anywhere upon the sea, through and within our domain, limits and territory, and with the fish which have been caught in the water, return to their own districts without any interference or obstacle whatsoever, either to their fish, their nets or any of their belongings. Therefore we command you and each of you, not to interfere with the return of such fisherman & *mutatis mutandis*, as has been set out above. But on the other hand such fisherman and those of them who comport themselves well and properly must not under pain of these presents, do, or undertake, or in any way whatever attempt to do, or undertake anything which might work to our prejudice or disadvantage or our injury or disturbance, either in our Kingdom of England or in that of our allies. 5 October 1406.

¹³ *Id.*

exemption rather stating "that for various reasons" and "for the present so inclined" the practice would be allowed.¹⁴

Toward the middle of the 17th century, the complete neutrality of the fisheries was admitted as a principle of maritime international law.¹⁵ Louis XVI, in a letter to his admirals on June 5th 1779, stated that his reasons for granting the coastal fishing vessel protection were his desire to soften the calamities of war, and to set an example he believed his enemies would reciprocate. The King did not feel obliged to restrict seizures of fishing vessels because it was a norm. Rather, he did so out of humanitarian reasons. The ordinance provided that the English fishing vessels would not be captured, even if the fish had not been caught from the vessel (transshipped). Nonetheless, if the vessels were "armed with any weapon of offense," or "have given any signals which might indicate a suspicious relation with the enemy's vessels of war" then they were subject to attack and capture.¹⁶

Two notable points arise here. First, armed vessels are specifically addressed and given limited protection. Second, the ability of a fishing vessel to transfer its catch to another vessel with the exemption applying to the shipping vessel is recognized. This transshipment issue would seem to contradict the British custom of seizing vessels transporting fish as a form of trade, vice vessels exclusively engaged in subsistence fishing.

The practice of nations in excluding fishing vessels from capture became more widespread in the 19th century. This practice, evidenced by writings of international scholars of the time, establishes a strong basis for the development of the coastal fishing vessel exemption as customary international law.

Heffner, in his seminal work, *European International Law*, stated that:

If the war also extends to the sea, not only are the vessels of the hostile executive powers mutually subject to the right of conquest and confiscation, but there is also added an absolute right of appropriation in regard to the private ships and goods of the enemy, from which they are only excepted by way of humanity, the vessels and implements of coast fisherman.¹⁷

¹⁴ *Id.*

¹⁵ DE CUSSY, PHASES ET CAUSES CELEBRES DU DROIT MARITIME DES NATIONS, vol. II, 164 (1856).

¹⁶ See *infra* note 125.

¹⁷ HEFFTER, EUROPEAN INTERNATIONAL LAW, section 137 (6th ed. 1873).

Other nineteenth century scholars have written, in the practice of the leading maritime States it is customary to exempt from the seizure and confiscation of the enemy goods -- the vessels and implements of coastal fisherman.¹⁸ De Cussy devoted an entire chapter to the freedom and complete neutrality of the fisheries.¹⁹ He stated:

If positive international law alone were consulted, fishing boats would be subjected, like all merchant vessels, to the law of prize; a sort of tacit agreement between all the European nations frees them from it, and several official declarations have confirmed this privilege²⁰

Pistoye and Duverdy lend further support to the fishing vessel exclusion:

Enemy vessels, as has been said, are good prize. Not all, however; for it is established by the unanimous accord of the maritime powers that an exception must be made in favor of coast fisherman. Such fisherman are respected by the enemy so long as they devote themselves exclusively to fishing.²¹

The rationale for the coastal fishing vessel exemption finds particular relevance in the writings of Ortolan. "The coast-fishing industry is, in effect, entirely pacific and of much less importance than maritime commerce or the great fisheries in regard to the national wealth which it can produce."²² As an example, Ortolan quotes the orders given to the French navy by the French Secretary of State, March 31, 1854, on the outbreak of the Crimean war:

You will not interfere in any way with the coast fisheries even on the enem's shores; but you will see that this favor, dictated by humanity, does not give rise to any abuse which may prejudice military and maritime operations.²³

Again a qualified immunity was provided contingent on the fishing vessels refraining from military activity. The practice of the French navy was further evidenced during the Franco- Prussian war, as the French Secretary of

¹⁸ KALTENBORN, EUROPEAN LAW OF THE SEA, Vol. II, 480 (1851).

¹⁹ DE CUSSEY, *supra* note 15 at 164.

²⁰ *Id.*

²¹ PISTOYE AND DUVERDY, MARITIME PRIZES, vol. I, 314 (1860).

²² ORTOLAN, DIPLOMACY OF THE SEA, II, 51 (1864).

²³ *Id.* at 448-9.

State issued an identical instruction to his navy on July 25, 1870.²⁴ One evident change to the exemption noticeable in Ortolan's writings is the notion that if the fisheries are contributing to the war effort, the "national wealth," in Ortolan's words, then the vessels would lose the exemption from seizure because they were sustaining the war effort. Thus a distinction arises between those fishing vessels that somehow contribute to the ability of the country to sustain war, the clearest example being the feeding of combatants, and those which have no war-sustaining function.

Many authorities did not go as far as Ortolan. Bluntschli simply follows earlier writers by noting that, "If the fishing boats serve war-like purposes, then they are exposed to capture, but not so long as they are used in the peaceful calling of fisherman."²⁵ Having been well established, it was said that "the exemption of the fishing trade from the law of prize in modern international law, may be considered as well established through well-founded custom."²⁶

The first real exposure the United States Navy had operating amongst fishing vessels off an enemy's shore was during the Mexican war. In the course of the war with Mexico, the U.S. allowed Mexican fishermen to continue to freely exercise their industry.²⁷ Mexican boats engaged exclusively in fishing, on any part of the coast, will be allowed to pursue their labours unmolested.²⁸ The U.S. reaffirmed this practice in its Treaty of Peace with Mexico in 1848.²⁹

2. Departures from the Rule.

It is important to look at departures from the norm in order to ascertain whether the norm is still valid and therefore binding, or whether a new norm is emerging. Not only is it important to look at what specially affected states do, but just as important is what they say or the rationale they give for any departures.

²⁴ FREEMAN SNOW, *CASES ON INTERNATIONAL LAW*, 565-6 (1895).

²⁵ BLUNTSCHLI, *MODERN INTERNATIONAL LAW*, sec. 667 (1872).

²⁶ PERAL, *INTERNATIONAL PUBLIC LAW OF THE SEA* 216 (1882).

²⁷ CALVO, *4 DROIT INTERNATIONAL*, 325-27, sec. 2372 (5th ed. 1896).

²⁸ Orders of Commodore Conner, Commanding the Home Squadron blockading the east coast of Mexico, May 14, 1846 and approved by the Secretary of the Navy on June 10th 1846.

²⁹ Treaty of Peace, Friendship, Limits, and Settlement, Treaties and Conventions between the United States and other Powers, 681,691, 9 Stat., 922,939 (1848).

French ordinances of 1681 and 1692 discontinued the exemption from capture because of the conduct of her enemies who abused the good faith with which she had observed the treaties by habitually carrying off her fishermen.³⁰ The exemption from capture fell into disuse because of the mutual suspicions of France and England during the French Revolution.³¹ In response to the English capture of fishing vessels the French National Convention issued a decree on October 2, 1793, directing the executive power to protest against this conduct reclaim the fishing boats seized; and in case of refusal, to resort to reprisals.³²

In the war of 1800, the British and French governments issued formal instructions exempting the fishing boats of each others subjects from seizure. This order was subsequently rescinded by the British government on the alleged grounds that some French fishing boats were equipped as gunboats, and that some French fishermen, who had been prisoners in England, had violated their parole not to serve and had gone to join the French fleet at Brest. Such excuses were evidently mere pretexts, and after some angry discussions had taken place on the subject, the British restriction was withdrawn, and the freedom of fishing was again allowed on both sides.³³

The British never argued that they had a right to capture or attack all fishing boats, only those shown by factual circumstances as being used for a military purpose. The departures from the exemption were all based on factual claims that vessels were engaged in some sort of military service and therefore do not represent a complete abrogation of the exemption. The use of military necessity, or what may be perceived as a military necessity, as the basis for this departure from the norm is one of the significant challenges to the coastal fishing vessel exemption. Professor Snow observed that during the wars of the French Revolution and Empire the danger of invasion of England was considered so imminent that no means were spared to cripple the French at sea, both with respect to fighting and transporting power.³⁴ As a consequence the boats and men belonging to the French coast fisheries were captured.³⁵ Snow believed that "when similar circumstances arise similar action may be

³⁰ VALIN, *SUR L'ORDONNANCE DE LA MARINE*, 689-690 (1776).

³¹ WHEATON, *DIGEST OF THE LAW OF MARITIME CAPTURES AND PRIZES*, c.2 at 18 (1815).

³² 2 DE CUSSY, *supra* note 15, at 164-165.

³³ HALLECK, *INTERNATIONAL LAW ON RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR*, 23 (1st ed. 1861).

³⁴ Freeman Snow, *NAVAL WAR COLLEGE LECTURES* 94 (1895).

³⁵ *Id.*

anticipated in a maritime war." Thus military necessity would dictate that the exemption could not be claimed as a rule of international law.³⁶

Herein lies one of the fundamental considerations for any military action, the concept of military necessity. In essence, belligerents are restricted to those actions which contribute to the defeat of opposing combatants.³⁷ The concept of military necessity was defined by Dr. Francis Lieber: "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war."³⁸

France responded with reprisals for the acts of its enemies in seizing French fishing vessels. The reprisals by the French did not constitute an abrogation of the rule but an attempt to force the opposing belligerent to comply with the customary norm.

During the Crimean war, England, which had professed to follow the norm only as a matter of comity, instructed its forces operating in the Sea of Azov to destroy the fisheries, nets, fishing implements, provisions, boats and even the cabins of the coastal inhabitants.³⁹ The English claimed that this destruction was militarily necessary to clear the seaboard of all fish stores, all fisheries and mills, on a scale beyond the wants of the neighboring population, and indeed of all things destined to contribute to the maintenance of the enemys army in the Crimean.⁴⁰ This was an obvious claim that the fishing industry itself contributed to sustaining the enemies war effort. This conduct was prophetic of later state practice.

3. World War I

During World War I, Germany followed the British example set in the Crimean War. Throughout the war the Germans did their utmost, by every means at their disposal, to destroy their enemies fishing vessels. The attack by the German Navy on fishing vessels was so widespread one writer in Great Britain described them as follows:

³⁶ *Id.*

³⁷ See 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Article 52(2), cited in ROBERTS & GUELFF, DOCUMENTS ON THE LAWS OF WAR 387, 416 (2d ed. 1989).

³⁸ R. HARTIGAN, LIEBERS CODE AND THE LAW OF WAR (1983).

³⁹ CALVO, *supra* note 27 at section 2373.

⁴⁰ UNITED SERVICES JOURNAL of 1855, part 3 at 108-112. The English claimed that the property destroyed consisted of large fishing establishments and storehouses of the Russian government, numbers of heavy launches, and enormous quantities of nets and gear, salted fish, corn and other provisions, intended for the supply of the Russian Army.

No consideration of humanity or law restrained them. They deliberately fired upon and sank steam and sailing vessels that were engaged solely in fishing; in very many cases they forced crews to abandon their vessels and take their chance of safety in small boats; and they committed acts which were the equivalent to willful murder.⁴¹

The object of the German attacks on fishermen was two-fold. First, they sought to instill fear in the British people through terror; and second, they sought to reduce the supply of food to the British by removing fishing vessels from service.⁴² Because of numerous restrictions on fishing areas and the fear of German attacks, many fishermen were not venturing forth. This created an enormous surplus of seamen and vessels which the British ultimately absorbed into Admiralty service.⁴³ This obviously created a problem of distinction between innocent fishing vessels and those directly supporting the military, but it is important to point out that the German attacks on British fishing vessels preceded and lead to the use of excess fishing vessels to support the military.

It was also reported that German airships at sea attempted to destroy British fishing vessels.⁴⁴ It is likely, however, that they did so only to forestall the fishing vessels from reporting the Zeppelins' position⁴⁵

The Secretary of the Admiralty announced that as of March 17, 1915, 28 fishing vessels had been sunk or captured and 19 more lost to naval mines since the war began.⁴⁶ When German submarines began "unrestricted"

⁴¹ WALTER WOOD, *FISHERMEN IN WAR TIME*, 73 (London, D. Sampson Low, Marston & Co., 1918). An illustration of the frightfulness of one German attack was recounted in the loss of the trawler *Vanilla* which was destroyed by a German submarine in April 1915. The crew was in the process of hauling her gear when without any warning a submarine half awash discharged a torpedo at her. On board a near-by vessel the *Fermo*, horrified watchers saw the terrible explosion as the *Vanilla* completely disappeared along with the entire crew of nine. *Id.* at 77-79.

⁴² *Id.* at 74.

⁴³ *Id.* at 74-75.

⁴⁴ *Id.* at 83.

⁴⁵ *Id.* On one occasion incoming trawlers at Grimsby reported that they had sighted four Zeppelins hovering over the North Sea, apparently waiting for dark before attempting a raid on England. It is not clear whether fishermen reported information to the military out of patriotism or whether they were under an obligation to do so as a condition of fishing.

⁴⁶ *Id.* at 81.

operations in 1917, the total losses of fishing vessels during the period from February 25 to December 22, inclusive, were 167.⁴⁷

The question of whether the German practice would have taken place, absent the purposeful use of fishing vessels by the British navy, may be answered by looking at the practice of the German submarine fleet near the North American coast. German submarine attacks against American fishing vessels occurred with great frequency. Two attacks of significance took place during August 1918. On August 3rd, the German submarine U-156 attacked a fleet of fishing vessels northwest of Seal Island, Nova Scotia, sinking 4 vessels.⁴⁸ On August 10th, an even more severe attack on fishing vessels took place in the western Atlantic by the German submarine U-117 which sank 9 vessels.⁴⁹

The significance of the second group of attacks is that 8 of the 9 vessels destroyed were smaller than the *Paquete Habana*, a vessel which had been exempted from capture by a U.S. Supreme Court ruling less than two decades earlier.⁵⁰ The circumstances of the attacks upon these fishing vessels is unclear. Still, it is clear that these vessels were not engaged in any direct military activity. It is also likely the vessels only fled the Germans when they were attacked rather than having resisted visit and search. The indiscriminate attacks by the German navy during the war was one of the reasons for the 1936 London Protocol.⁵¹

4. World War II

Germany, although a party to both the London Protocol of 1936 and Hague XI, was accused of violating both of these conventions during the course of the war. It was estimated that over 200 fishing vessels were bombed, machine-gunned, or sunk by Germany in the first year of the war.⁵² The German Navy probably had a sufficient basis to depart from the rules based on

⁴⁷ *Id.* at 82.

⁴⁸ American Ship Casualties of the World War, Dept. of the Navy, 14 (GPO, 1923). *Muriel* (120 tons), *Atwood* (100 tons), *Annie Perry* (116 tons), and *Rob Roy* (112 tons). The first three vessels were schooners and the *Rob Roy* was a gas screw vessel. All these vessels were sunk by surface submarine bombardment.

⁴⁹ *Id.* at 14-15. *The Adela May* (31 tons), *Starbuck* (53 tons), *Progress* (34 tons), *Reliance* (19 tons), *Earl and Nettie* (24 tons), *Cruiser* (28 tons), *Old Time* (18 tons), *Mary E. Sennett* (27 tons), and *Katie L. Palmer* (31 tons). All the vessels were gas screw and were sunk by surface bombardment and gunfire.

⁵⁰ See *infra* note 125.

⁵¹ See *infra* note 171, for a more through discussion of the London Protocol.

⁵² COLOMBOS, A TREATISE ON THE LAW OF PRIZE, n.1 at 252 (1940).

British instructions at the outbreak of the war which required British ships to report by radio the positions of any submarines sighted.⁵³ Furthermore, on 1 October 1939, the British Admiralty announced that merchant shipping had been instructed to ram all hostile submarines.⁵⁴ Given this environment, and the fact that in the first three months of the war 1,000 British merchant ships were equipped with guns, any fishing vessel venturing forth would be at risk, thus making the practice of exemption a moot issue.

When arguing the demise of the fishing vessel exemption, Rousseau cited German destruction of allied fishing vessels in both World Wars, Japanese destruction of Chinese junks between 1937-1945, and the capture by the Soviet Union of 185 Japanese fishing vessels near Hokkaido near the end of World War II.⁵⁵

Does all this mean that the exemption has become a nullity? An analysis of this state practice points to the conclusion that the exceptions to the exemption and the requirements of military necessity have strictly narrowed the exemption. Still, it should be noted that departures based on factual distinctions do not amount to a total abrogation of the rule, and therefore the rule survived the state practice of World War II.

5. Korea

The forces mustered to respond to the invasion of South Korea by North Korea possessed a far superior naval force and thus completely controlled the seas surrounding the Korean Peninsula.⁵⁶ In September 1950, United Nations forces issued an order restricting fishing by North Koreans.⁵⁷ The attitude behind the restriction was that food derived from fishing was legitimate contraband and should be stringently denied the Communists.⁵⁸

⁵³ VICE ADMIRAL FRIEDRICH RUGE, *THE GERMAN NAVY'S STORY 1939-1945* at 65 (Saunders, trans., U.S. Naval Institute, 1957).

⁵⁴ *Id.*

⁵⁵ C. ROUSSEAU, *CHRONIQUE DES FAITS INTERNATIONAUX, REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC* at 293.

⁵⁶ In accordance with UN Security Council Resolutions 82 and 84 the President of the US ordered a naval blockade of the entire Korean coast. See U.N. SCOR Supp. (June-Aug. 1950) at 50, and U.N. Doc. S/1580 (1980), reprinted in 10 MARJORIE M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 866-67.

⁵⁷ MALCOLM CAGLE AND FRANK MANSON, *THE SEA WAR IN KOREA*, 296 (U.S. Naval Institute Press, 1957).

⁵⁸ *Id.* Fish was the main staple of the Korean diet, in fact in 1939, the Korean fishing industry ranked third in the world.

North Korean fishermen were informed of the fishing restrictions by leaflets passed out by blockading ships and dropped from aircraft.⁵⁹ Fishing vessels which were found violating the restrictions were seized or destroyed.⁶⁰ The effort and intensity by which U.S. naval forces enforced the fishing ban was evidenced by entries from the war diary of the destroyer USS *Douglas H. Fox*, which reported during a one-month period the capture of 120 fishermen and 29 boats.⁶¹

There was a valid military rationale for the fishing vessel restrictions beyond denying the enemy war-sustaining goods. The North Koreans had effectively stymied naval operations by emplacing naval mines from small boats. As the war progressed there was conclusive evidence that fishing boats were laying mines, almost nightly in blockaded waters.⁶² An attempt to conduct an amphibious landing at Wonsan was frustrated by North Korean forces when they used a group of fishing vessels to lay 2,000 mines in Wonsan Harbor and its approaches.⁶³

Shortly after the war began the North Korean government enforced a Fishing Union which exercised complete control over fishermen and their activities.⁶⁴ This state control over fishermen undoubtedly gave the North Korean armed forces preference for provisions. Thus a valid argument can be made that the fishing restrictions were an extension of a lawful blockade

⁵⁹ *Id.* The language of the leaflets was simple and straight-forward:

The Communists brought this terrible war upon you. You cannot fish from your boats until the Communists are killed or thrown out. The United Nations Forces are human and do not desire to harm innocent victims of the war, but if you try to fish again before the Communists are completely defeated, you must suffer the consequences. A legal blockade has been declared and is enforced by United Nations Forces. *Id.* at 296-7.

⁶⁰ *Id.* at 297. The War Diary of the USS *Fox*, 6 May 1952 reported the hoisting of two captured sampans aboard while a third was set adrift. *Id.* at 346. Additionally, if the fishing vessels tried to run to shore, naval forces operating in whaleboats would land a landing party to destroy the vessels on the beach. *Id.* at 297.

⁶¹ *Id.* at 347. It is interesting to compare this 1 month figure with the almost identical 10 month figure from Operation Market Time in Vietnam. See *infra* note 96 and accompanying text.

⁶² *Id.* at 296. The USS *Cunningham* reported that during anti-fishing operations on 19 September 1952, a fishing vessel dropped a floating mine while the *Cunningham* was closing the fishing vessel. *Id.* at 356.

⁶³ FRANK UHLIG, *HOW NAVIES FIGHT* 298 (Naval Institute Press, 1994).

⁶⁴ *Supra* note 57 at 353. Unless a fishermen was a member of the union he could not obtain hooks, nets or other essential equipment. Additionally, Communist troops often forced the fishermen to defy the fishing ban. The Communists would herd the fishermen into their sampans, place guards in several boats, and at gunpoint forced the fishermen to sea. *Id.* at 354.

enforcing the prohibition on the transport of war-sustaining supplies. The status of the coastal fishing exemption is further challenged by this situation.

The Korean conflict would seem to have stretched to the line the rule that small coastal fishing vessels when plying their trade are not subject to capture or attack.⁶⁵ The attacks might be justified under the theory that the destruction of these vessels was a military necessity because of their contribution to sustaining the enemies war effort.⁶⁶ The impact of the fishing restrictions was a widespread North Korean refugee problem caused by starvation as fishing had become almost impossible.⁶⁷ Clearly the intent of the fishing restrictions was not to starve the civilian population. Rather it, was designed to deny the enemy combatant war-sustaining supplies. As a result, the Reds had to try and replace the fish the North Koreans could not get with fish imports from Manchuria and China.⁶⁸ One commentator cautions the approach taken against fishing vessels during the Korean war by stating that, new attitudes with regard to proportionality and the rights of non-combatants would require greater care than may have been necessary in the past.⁶⁹ This may indeed be true, yet the incorporation of food in the category of a war-sustaining commodity under the concept of blockade and embargo operations has not yet changed state practice.

6. Vietnam

A century had passed since the Navy had last had to fight a serious coastal and riverine campaign like the one encountered in Vietnam.⁷⁰ General Westmoreland reported, "Before 1965 the Viet Cong had received an estimated 70 per cent of their supplies by maritime infiltration."⁷¹ It was common practice for boats used in subsistence fishing to also be used as waterborne logistics craft or WIBLICKS.⁷² Small sampans, junks, and trawlers were all

⁶⁵ Fenrick, *The Military Objective and the Principle of Distinction in the Law of Naval Warfare*, in 7 Bochumer Schriften zur Friedenssicherung und zum Humanitären Völkerrecht 1, 17 (1991).

⁶⁶ CAGLE & MANSON, *supra* note 57 at 296-297.

⁶⁷ *Id.* at 354.

⁶⁸ *Id.* at 357.

⁶⁹ Green, Comment, in "Law of Naval Warfare: Targeting Enemy Merchant Shipping," 65 INTERNATIONAL LAW STUDIES at 225 (Grunawalt ed. 1993).

⁷⁰ FRANK UHLIG, JR., VIETNAM: THE NAVAL STORY, 269 (Naval Institute Press, 1986).

⁷¹ WILLIAM C. WESTMORELAND, A SOLDIER REPORTS, 185 (Garden City, N.Y.: Dell Publishing Co., 1976).

⁷² D. P. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 177 (1975).

used in clandestine supply operations by the Viet Cong. Infiltrators tried to disguise operations by mixing in shipping lanes and fishing areas, by taking advantage of low visibility conditions, by using false flags, hull numbers and crew papers, and by camouflaging ships.⁷³ Without question the enemy did not follow the obligation to separate military activity from civilians and civilian objects.⁷⁴ This is often the case during insurgency operations, but the departure from the rules by the insurgents does not relieve the opposing forces of their obligation to follow the laws of war.⁷⁵

The enemy also used steel trawlers between 80 and 130 feet in length for some logistical runs.⁷⁶ In February 1965, a camouflaged trawler was spotted close ashore in Vung Ro Bay. Air strikes sunk the 130 foot trawler and resulted in the recovery of over 100 tons of war material.⁷⁷ Many of the logistical runs in large vessels took place before the seaborne interception began to effectively reduce the likelihood these large ships would remain undetected.

One of the main missions of sea power in any counterinsurgency operation is to prevent infiltration, either from outside the nation or from one insurgent controlled area to another within the nation.⁷⁸ In the process of identifying an appropriate plan to stop the coastal logistics resupplying to South Vietnam, two assumptions were made regarding this infiltration. First, coastal junk traffic would attempt to mingle with the more than 50,000 registered civilian craft which plied the coastal waters, and second, vessels of trawler size

⁷³ Small Craft Counterinsurgency Blockade, NOLTR 72-65, 4 (Dept. of the Navy, Naval Ordnance Lab., 3 Feb. 1972). This publication was a report on Counterinsurgency operations lessons learned.

⁷⁴ This was clearly a violation of Hague XI, Article 3 which obliges the parties not to take advantage of the harmless character of the said vessels in order to use them for military purposes. Additionally, although not codified at the time, Protocol I, Article 58 places a duty on the parties to separate civilians from military objectives/targets.

⁷⁵ Common Article 1 of all 4 Geneva Conventions of 1949 requires the Parties to respect and ensure respect for the . . . Convention in all circumstances. See also Protocol I, Article 51 (8): Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population.

⁷⁶ UHLIG, *supra* note 70 at 271.

⁷⁷ *Id.* at 309.

⁷⁸ Nelson & Mosher, *Proposed: A Counterinsurgency Task Force*, 92 NAVAL PROCEEDINGS 38 (June 1966).

or larger would attempt to approach the coast on a perpendicular run from the high seas toward the coast.⁷⁹

To stop this infiltration, a plan was proposed and approved by the Joint Chiefs of Staff on 16 March 1965. The plan was given the code name "MARKET TIME" on 24 March.⁸⁰ The objectives of the operation were twofold: first, to halt the stream of trawler-borne arms from North Vietnam to the Viet Cong; and second, to interdict the internal movement of junks and sampans ferrying troops, arms and supplies to the Viet Cong.⁸¹ Ultimately, there were two operations designed to prevent the infiltration of supplies, MARKET TIME and "SEA DRAGON."⁸² Operation MARKET TIME covered the coasts of South Vietnam and was designed as a defensive operation.⁸³ Operation SEA DRAGON was an offensive operation designed to interdict and harass the maritime supply routes from North Vietnam.⁸⁴ An associated operation designed to deny the enemy the use of major rivers as infiltration routes began in April 1966, and was named "GAME WARDEN."⁸⁵ Since operation GAME WARDEN was carried out primarily in the internal waters of South Vietnam, it involved boats which were not necessarily "coastal" although at times the distinction between those in rivers and others in the ocean was difficult. Nonetheless, the general principles of the law of war apply in both cases.

In April 1965, the Government of South Vietnam declared its territorial waters a Defensive Sea Area, and it listed cargoes which would be considered suspect and subject to seizure.⁸⁶ The defensive sea area off the South Vietnamese coast was eventually extended to over 30 miles from the

⁷⁹ Schreadley, *The Naval War in Vietnam 1950-1970*, in UHLIG, *supra* note 70 at 283.

⁸⁰ *Id.*

⁸¹ UHLIG, *supra* note 63 at 316.

⁸² OCONNELL, *supra* note 72 at 176.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See UHLIG, *supra* note 70 at 367-74, for an account of Operation GAME WARDEN.

⁸⁶ Hodgman, *Market Time in the Gulf of Thailand*, in UHLIG, *Id.* at 309-310. Listed were weapons, ammunition, communications equipment, chemicals with military uses, medical supplies, and foodstuffs of North Vietnamese, Chinese Communist or Soviet-bloc origin.

coast.⁸⁷ Because of the political nature of the Vietnam conflict, U.S. Naval and Coast Guard vessels had to receive approval from the government of South Vietnam to conduct operations inside the three-mile territorial sea. On 11 May 1965, the Government of South Vietnam granted formal authorization for the U.S. units conducting Operation MARKET TIME to stop, search and seize vessels not clearly engaged in innocent passage.⁸⁸ Additionally, vessels in the contiguous zone,⁸⁹ extending 12 miles from the coast, suspected as infiltrators were also subject to search and seizure.⁹⁰

The entry into force of the 1958 Convention on the Territorial Sea and the Contiguous Zone added a codified international law dimension to the previous customary practice of states. Although foreign vessels were permitted to travel through the territorial sea of South Vietnam in the exercise of their right of innocent passage, there was some concern that the transshipment of war supplies could take place. It should be noted that the words chosen to describe the operation avoided the terminology associated with a belligerency, those of visit and search which denote the right of a belligerent to enforce a blockade.

The scope of Operation MARKET TIME was immense not just in the vast area it covered, almost 1000 miles of coastline, but also the sheer volume of vessel traffic which operated offshore each day.⁹¹ The problem of picking out the violators, given the large number of coastal fishing vessels and limited number of monitoring resources, was a challenge for any commander. Observing the fishing practices in the Gulf of Tonkin was one method to distinguish vessels entitled to protection from those that were not.⁹² The task of controlling the coastal waters was further complicated by the general failure of vessels to keep out of established prohibited zones. The zones proved ineffective for a number of reasons including: poor navigational means used by

⁸⁷ 2 EDWARD J. MAROLDA AND OSCAR P. FITZGERALD, *THE UNITED STATES NAVY AND THE VIETNAM CONFLICT* 518 (1986). The original defense zone was promulgated in Republic of Vietnam Decree on Sea Surveillance, Apr. 27, 1965, in *INTL LEGAL MATERIALS* 461 (1965).

⁸⁸ *Supra* note 70 at 283-284. Innocent passage was defined in the 1958 Territorial Sea Convention as: Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Such passage shall take place in conformity with these articles and with other rules of international law Article 14(4).

⁸⁹ Convention on the Territorial Sea and Contiguous Zone, Geneva, Apr. 29, 1958, article 24, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter 1958 Territorial Sea Convention].

⁹⁰ *Supra* note 70 at 284.

⁹¹ *Id.* at 326.

⁹² O'CONNELL *supra* note 72 at 177.

fishermen, the need of vessels to transit zones in order to fish certain areas, and the fact that many restricted zones happened to be the best fishing waters.⁹³ All of these reasons seem to stem from a lack of coordination with local fishermen. Certainly taking away someone's livelihood for no military reason does not win many hearts and minds either, thus enforcement was often lax.

The focus of Operation MARKET TIME took place inshore, well within the territorial sea of South Vietnam, where heavy fishing and coastal commercial traffic took place. The density of the vessel traffic resulted often in searching and inspecting thousands of boats each day.⁹⁴ Most of the vessels operating in the Gulf of Thailand were 40 feet long or less.⁹⁵ In the first 10 months of MARKET TIME operations in the Gulf of Thailand more than 40,000 vessels had been either boarded or inspected and 140 Viet Cong suspects along with approximately 30 suspect junks were turned over to the South Vietnamese Navy.⁹⁶

MARKET TIME met with mixed success. Some authorities claimed the maritime interdiction cut off 90% of the enemies supplies⁹⁷, others were more skeptical.⁹⁸ It is clear that the operation succeeded in making the use of coastal fishing vessels less of an option and the North began to use larger and faster trawlers to deliver war material. Shortly after the Tet Offensive, five trawlers attempted to deliver supplies in the South. Three were destroyed and the remaining two vessels evaded capture, primarily because the U.S. rules of engagement would not permit hot pursuit.⁹⁹

North Vietnamese forces confronted with the success of MARKET TIME began using the port of Sihanoukville, Cambodia, near the South Vietnamese border, to off load supplies. From 1966-1969, 26,000 tons of military supplies destined for enemy use was off loaded at Sihanoukville.¹⁰⁰

⁹³ *Id.*

⁹⁴ UHLIG, *HOW NAVIES FIGHT*, at 318.

⁹⁵ Hodgman, in UHLIG, *VIETNAM: THE NAVAL STORY* at 326.

⁹⁶ *Id.* at 341. Additionally, 2 Viet Cong junks had been sunk in battle and one 110 foot steel-hulled trawler had been intercepted and destroyed.

⁹⁷ WESTMORELAND, *A SOLDIER REPORTS*, at 184.

⁹⁸ Wundelin, *Paradox of Power: Infiltration, Coastal Surveillance, and the United States Navy in Vietnam 1965-68*, *JOURNAL OF MILITARY HISTORY* 275-289 (July 1989).

⁹⁹ UHLIG, *HOW NAVIES FIGHT*, at 319.

¹⁰⁰ *Id.* at 320.

This was an obvious violation of the law of neutrality,¹⁰¹ and the U.S. or Vietnamese forces would have been lawfully justified in exercising the right of self-help to interdict the supplies.¹⁰² The North Vietnamese attempted to open maritime logistic lines into South Vietnam again in August 1969.¹⁰³ Through April 1972, thirty attempts were made by trawlers to infiltrate, of which only three succeeded.¹⁰⁴

The steel-hulled trawlers trying to infiltrate with supplies would clearly not be subject to any small coastal fishing vessel exemption. Not only were they directly supporting military operations, but also they were not within the customary definition of coastal fishing vessels or traders. The question, though, is how could the Vietnamese or supporting U.S. naval forces interdict these vessels and capture them outside the 12 mile contiguous zone? The only circumstance which would permit this during a non-belligerency is the right of hot pursuit, and this would have required the vessel to have first entered the contiguous zone before pursuit commenced.

7. Deep-Sea Fishing Vessels

The privilege from capture which is generally given to fishing boats in the proximity to shore is in no country extended to vessels which are engaged on the high seas in what is called the "great fisheries."¹⁰⁵ One notable exception to this trend was the deep-sea fisheries used by the inhabitants of Nantucket during the War of 1812.¹⁰⁶ Deep-sea fishing vessels were in effect considered engaged in both commercial and industrial operations.¹⁰⁷ Therefore,

¹⁰¹ 1907 Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War, Article 5, stated that it was forbidden to use neutral ports and waters as a base of naval operations. Additionally, Article 25 provides that the neutral must prevent the use of its territory as a place of sanctuary or base of operations. See also, 1907 Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land, Article 2 which forbids belligerents to move munitions of war or supplies across the territory of a neutral power.

¹⁰² NWP 1-14M, para. 7.3 at 7-2: If the neutral nation is unable or unwilling to enforce effectively its right of inviolability, an aggrieved belligerent may resort to acts of hostility in neutral territory against enemy forces making unlawful use of that territory. Citing Tucker, *The Law of War and Neutrality at Sea*, U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 220-226 (1957).

¹⁰³ UHLIG, *HOW NAVIES FIGHT* at 320.

¹⁰⁴ *Id.* It should be noted that the figures for trawlers does not consider the hundreds of smaller sampans used as WIBLICKS (water borne logistics craft), seized and turned over to the South Vietnamese Navy.

¹⁰⁵ CALVO, *supra* note 27 at 2373.

¹⁰⁶ SNOW, *NAVAL WAR COLLEGE LECTURES*, 97 (1895).

¹⁰⁷ CALVO, *supra* note 27 at 2373.

these vessels were considered a war-sustaining activity and thus a lawful economic target for capture. It has never been contended, except by the French at the beginning of the 19th century, that vessels engaged in deep-sea fishing are exempt from capture.¹⁰⁸ The limits of the early rule were defined by De Boeck:

[T]he immunity of the coast fishery must be limited by the reasons justifying it. The reasons of humanity and harmlessness which militate in its favor do not exist in the great fishery . . . ships engaged in that fishery devote themselves to truly commercial operations . . . And these same reasons cease to be applicable to fishing vessels employed for a warlike purpose.¹⁰⁹

De Boeck further proposed that only vessels taken in the act should lose their exemption from capture, otherwise to allow seizure by way of prevention would open the door to every abuse, and would be equivalent to suppression of the immunity.¹¹⁰ What De Boeck was proposing was establishing a presumption of innocent use. This would imply that over-restricting coastal fishing, which has the affect of constructively banning fishing, would defeat the humanitarian objective of the rule.

Historically, the definition of a deep-sea fishing vessel did not rely on the size of the boat as much as on the way it is rigged and how it is used. Vessels which fish in far off seas such as whaling ships, cod fishermen and sealing vessels have been defined as deep sea fishing vessels.¹¹¹ Eventually, however, the size of the boat became indicative of its purpose and, as such, its treatment under the exemption.

One particular example is the case of the Argentine trawler the *Narwhal* during the Falkland/Malvinas War. The *Narwhal* was a 1,400-ton fishing trawler which was commandeered for intelligence purposes at Mar Del Plata, Argentina on 22 April 1982.¹¹² The *Narwhal* had been intercepted by a British frigate on 30 April and warned to leave the area of the British battle group. The vessel remained in the area gathering intelligence and was finally attacked on the morning of May 9th, for violating the warning to depart the

¹⁰⁸ W. E. HALL, TREATISE ON INTERNATIONAL LAW 468-9 (4th ed. 1895).

¹⁰⁹ DE BOECK, ENEMY PRIVATE PROPERTY UNDER ENEMY FLAG, 196 (1882).

¹¹⁰ *Id.*

¹¹¹ 4 Calvo, at 327.

¹¹² HASTINGS AND JENKINS, THE BATTLE FOR THE FALKLANDS, 158 (Norton & Co. NY, 1983).

area.¹¹³ A British boarding party captured an Argentine naval officer who had been placed on board the vessel earlier.

A number of issues arise from this incident. First, the *Narwhal* was not a coastal fishing vessel, rather she was a deep-sea fishing vessel and therefore not entitled to any exemption from attack or capture. Second, she was engaged in an activity which was directly supporting military operations, that of intelligence collection, and thus fell into one of the exceptions to the exemption. Finally, she did not obey the orders of the naval commander in control of the area and thus put herself at risk from attack as a matter of unit self-defense.

A question may arise as to what obligation the British had under the auspices of the London Protocol¹¹⁴ to make safe the crew before attacking? A number of authorities believe that state practice has created an exception when targeting enemy merchant vessels if they are involved in support of enemy operations.¹¹⁵ Specifically, the U.S. Navy's current manual on the law of naval warfare, NWP 1-14M, states that "enemy merchant ships may be attacked with or without warning if the merchantman: . . . (5) is incorporated into, or assists in any way, the enemys armed forces intelligence system."¹¹⁶

B. Judicial Decisions

1. *The Young Jacob and Joanna*

Another source of customary international law are judicial decisions.¹¹⁷ The earliest reported case in which a fishing vessel was condemned in the English courts is that of the *Young Jacob and Joanna*.¹¹⁸ The *Young Jacob* was a Dutch fishing vessel seized in April 1798 while it was en route back to Holland. The boat was seized because it was believed to be engaged in the service of the enemy by carrying information it had acquired

¹¹³ *Id.*

¹¹⁴ See *infra* note 171 for a complete discussion of the London Protocol.

¹¹⁵ For a complete work on this topic see Grunawalt, *The Law of Naval Warfare: Targeting Enemy Merchant Shipping*, 65 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES (1993).

¹¹⁶ Office of the Chief of Naval Operations, Dept. of the Navy, NWP 1-14M, Commander's Handbook on the Law of Naval Operations, para. 8.2.2.2, at 8-3 (1995), [hereinafter Commander's Handbook].

¹¹⁷ *Supra* note 11, at par. 1.d.

¹¹⁸ 1 C. Rob., 20 (1798).

under the pretense of fishing.¹¹⁹ This action was consistent with the qualified exception of an earlier royal decree which forbid acts which were prejudicial to the English.¹²⁰ Thus the case of the *Young Jacob*, although appearing to be a departure from the earlier English practice, instead continued the practice of a qualified exemption.

One interesting aspect of the *Young Jacob* decision is the distinction which arose between fishing vessels used for subsistence fishing and fishing vessels "constantly and exclusively engaged in the enemy's trade."¹²¹ The narrowing of the exclusion seemed to be an attempt to distinguish those fishing vessels that were coastal in nature from those that were deep-sea fishing vessels and therefore likely to contribute to the war effort by providing food to the enemy. This decision marked a general trend to allow the capture of war-sustaining material produced by fishermen during blockade warfare.

It soon became apparent to the British that the previous rule had value and that the *Young Jacob* holding was too broad. Therefore, an Order in Council of 1806¹²² nullified the case as a precedent thereby reaffirming the capture exemption for coastal fisherman and construing the seizure rule to a narrow basis.

2. *La Nostra Signora*

The French courts also supported the principle of a coastal fishing vessel exemption. In the case of the Portuguese vessel *La Nostra Signora*, captured by a French privateer in 1801, the court ordered the ship restored based on the principle that fishing vessels are not considered hostile, and that the settled law of nations make them exempt from capture.¹²³ Additionally, the

¹¹⁹ *Id.* In upholding the seizure, Sir W. Scott said: "In former wars it has not been usual to make capture of these small fishing vessels; but this rule was a rule of comity only and not of legal decision; it has prevailed from views of mutual accommodation between neighboring countries and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment and, as they are brought before me for judgment, they must be referred to the general principles of this court; they fall under the character and description of the last class of cases; that is, of ships constantly and exclusively employed in the enemy's trade . . . It is farther satisfaction to me in giving this judgment to observe that the facts also bear strong marks of a fraudulent transaction."

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 408. It is this day ordered in Council that all fishing vessels under Prussian and other colors and engaged for the purpose of catching fish and conveying them fresh to market with their crews, cargoes and stores, shall not be molested on their fishing voyages and bringing the same to market; and that no fishing vessels of this description shall hereafter be molested.

¹²³ MERLIN'S REPERTOIRE UNIVERSEL ET RAISONNE DE JURISPRUDENCE, vol. 25 at 58 (Brussels, 1827). The court based its decision on an ordinance of October 1st, 1692, issued under the reign

Portuguese vessel's crew did not consist of more men than were necessary for navigating, for the handling of nets, and for several days work.¹²⁴ Thus, another relevant factor in determining whether the exemption should apply is the size of the crew. If the crew is clearly excessive for the work to be conducted during routine fishing operations, the fishing vessel may be transporting combatants or spies which would cause it to lose its exemption.

3. *The Paquete Habana and The Lola*

The question of whether the coastal fishing vessel exemption from capture had obtained customary international law status was greatly debated in the landmark U.S. Supreme Court case *The Paquete Habana and The Lola*.¹²⁵ This case involved the U.S. capture of a number of fishing vessels in the blockade of Cuba during the Spanish-American war of 1898. Each vessel was classified as a fishing smack,¹²⁶ flying the Spanish flag, operating out of Havana, and regularly engaged in fishing near the coast of Cuba.¹²⁷ The *Paquete Habana* was a sloop, 43 feet long and 25 tons while the *Lola* was a schooner, 51 feet long and 35 tons.¹²⁸ The size of the vessels is relevant for a number of reasons. First, these vessels were much larger than the open fishing vessels used during the 15th century. Second, these vessels were capable of staying at sea for long periods of time and traveling great distances. The *Paquete Habana* had been fishing at sea for over 25 days before being captured, and the *Lola* had traveled as far as the Yucatan peninsula of Mexico, nearly 300 miles, where it had fished for eight days before its capture en route back to Cuba.¹²⁹ Finally, the catch was clearly made for commercial purposes. Neither vessel had arms or ammunition aboard, nor did they attempt to breach the blockade or put up any resistance at the time of their capture.

of Louis XIV, which recognized the absolute neutrality of the fisheries. Although the ordinance provided that British vessels were excluded from French waters, the ordinance gave those British vessels found in French waters an 8 day period of safe conduct to leave. The purpose behind the ordinance was to protect against spying which was carried on under the pretense of fishing. Arguably the decree of Louis XIV would be viewed as nothing more than a safe-conduct provision rather than an exemption from capture. It should be pointed out that the French had a right to exclude the opposing belligerents vessels from its waters during hostilities as a simple matter of national security. See also, PISTOYE AND DUVERDY, I, 331 (1860).

¹²⁴ *Id.*

¹²⁵ *The Paquete Habana*, 175 U.S. 677 (Jan. 8, 1900).

¹²⁶ Webster defines a fishing smack as a small vessel commonly rigged as a sloop, used chiefly in the coasting and fishing trade. WEBSTERS NINTH NEW COLLEGIATE DICTIONARY 1112 (1985).

¹²⁷ *The Paquete Habana* at 678.

¹²⁸ *Id.* at 679.

¹²⁹ *Id.*

Both fishing vessels were brought by their captors to Key West where a prize court entered a final decree of condemnation and sale.¹³⁰ The appeals from the District Court decree were joined with similar appeals and included a number of other fishing vessels of up to 78-80 tons.¹³¹ The issue before the Court was simply whether the fishing smacks were subject to capture. The Court found that by an ancient usage among civilized nations, which began centuries earlier and had gradually ripened into a rule of international law, coastal fishing vessels pursuing their vocation of catching and bringing in fresh fish, have been exempted, with their cargoes and crew, from capture as a prize of war.¹³²

The government argued that the exemption for fishing vessels existed chiefly because of the insignificance of such property and the practical inconvenience of sailing small vessels to prize courts great distances away.¹³³ Additionally, the government argued two points of fact to support their position. First, the exemption applied only to small open boats of the dory, dingy, or yawl class, primarily propelled by oars.¹³⁴ The government stated that such small, open boats would hardly prove important to the enemy in the way of carrying supplies or information.¹³⁵ Vietnam and other modern insurgency campaigns have proved this argument to be flawed. In essence the government implied that if the boats did not constitute a threat to military operations, then they were exempt from capture. This position is consistent with the customary law that existed at the time. It is therefore surprising that the government did not prevail in the case.

Second, the government argued that the exemption only applied to those boats fishing "close" to the enemy's coast.¹³⁶ The government likened the seized vessels to those of American, British and French vessels of the Great Banks fishing fleets of the North Atlantic.¹³⁷ Given the numerous writings that

¹³⁰ *Id.* The vessels were sold at auction.

¹³¹ Brief for the United States, No. 395 and 396, 8732 at 4 (October Term, 1899).

¹³² *The Paquete Habana*, *supra* note 125 at 686.

¹³³ Brief for the Captors, *supra* note 131 at 9.

¹³⁴ *Id.* at 10.

¹³⁵ *Id.* at 6.

¹³⁶ *Id.* at 5.

¹³⁷ *Id.* at 6.

state an exemption for coastal fishing vessels while generally distinguishing them from deep-water fishing vessels that are not exempt from capture, the government had a persuasive argument to uphold the seizures in these cases. Unfortunately, the Court did not agree and held these captures were unlawful.

The blockade of Cuba was established pursuant to a presidential proclamation on April 22, 1898.¹³⁸ In this proclamation, the President declared that the United States had issued and would maintain that blockade "in pursuance of the laws of the United States, and the law of nations applicable to such cases."¹³⁹ A second presidential proclamation on April 26, 1898, although making no specific mention of fishing vessels, stated the President's desire "that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice."¹⁴⁰

The government argued that absent an express domestic exemption or treaty adhering to the exemption, such as earlier treaties provided,¹⁴¹ the practice of other nations had no impact on the manner in which the U.S. conducted the blockade of Cuba.¹⁴² The Court's response to this argument proved to be one of the most important statements on the impact of international law toward domestic law: "International law is part of our law . . . where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."¹⁴³

The purpose of the blockade was to cut off all commerce with the enemy. The captured vessels were en route to Cuban ports with cargoes of food (fresh fish) which the blockade was intended to exclude. Since the object of naval warfare is to cripple the enemy's commerce and cut off its supplies, the capture of these vessels could be viewed as justifiable given the war-sustaining nature of its cargo which very well could have been used to feed the garrison of Havana. The decision in the case was probably results-oriented because it overturned the seizure of boats which most countries' previous practice would not have exempted. In his dissent, Chief Justice Fuller poignantly stated, "It will be perceived that the exceptions [to the exemption] reduce the supposed rule to very narrow limits, requiring a careful examination

¹³⁸ The Paquete Habana, at 712.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See *infra* note 165.

¹⁴² The Paquete Habana at 712.

¹⁴³ *Id.* at 700.

of the facts in order to ascertain its applicability."¹⁴⁴ As we will see, the rule has become even narrower given the expansion of the definition of war-sustaining material.

Taking any part, however small, in hostilities causes a fishing vessel to lose its exemption from seizure. Essentially any direct support to military operations causes a loss of exempt status. This was best illustrated by the seizure of two Turkish fishing vessels which had been used to resupply the blockaded ports of Syria and Asia Minor.¹⁴⁵ The seizures in both cases were upheld by a prize court.¹⁴⁶

4. *The Berlin*

The distinction between coastal and deep-sea fisheries was discussed in the case of *The Berlin*.¹⁴⁷ Here the privilege of immunity from capture was not extended to vessels engaged in deep-sea fishing or the salt fish industry.¹⁴⁸ The British warship HMS *Princess Royal* captured *The Berlin*, a German herring fishing boat of 110 tons, fitted for salting herrings, about 100 miles from Wick on August 5, 1914.¹⁴⁹ The vessel was condemned by a British prize court as a lawful prize.¹⁵⁰ Moreover, the holding was based on the size, equipment and voyage of the vessel, by which the facts presumed the vessel to be engaged in deep-sea fishing which formed part of the trade of the enemy, thus making the *Berlin* subject to confiscation.¹⁵¹ As we saw in our discussion of state practice during World War I, the British condemnation of the *Berlin* resulted in reciprocal treatment to British fishing vessels.

¹⁴⁴ *Id.* at 718. The exceptions which Chief Justice Fuller was referring to were: vessels employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way; and further to vessels engaged on the high seas in taking fish which are not brought fresh to the market, but are salted or otherwise cured and made a regular article of commerce. *Id.*

¹⁴⁵ The *Marbrouck* (both vessels had the same name), J.O., 5506 (French Prize Court, June 25, 1918), cited in COLOMBOS, n.3 at 147.

¹⁴⁶ *Id.*

¹⁴⁷ *The Berlin*, 1 Imperial Prize Cases 29, at 265 (1914).

¹⁴⁸ HALL, *supra* note 9 at 95.

¹⁴⁹ *Id.*

¹⁵⁰ *Supra* note 147.

¹⁵¹ COLOMBOS, A TREATISE ON THE LAW OF PRIZE, 147 (London, The Grotius Society, 2d ed. 1940).

C. Bilateral Agreements and Other Codifications

Custom usually precedes codification by varying lengths of time. The lack of a treaty does not mean a customary practice does not establish a norm which will be followed by states even in the absence of a treaty. One scholar noted, after observing that there were few public treaties which made mention of the immunity of fishing vessels in time of war, that:

[T]he custom which sanctions this immunity is not so general that it can be considered as making an absolute international rule: but it has been so often put into practice, and, besides it accords so well with the rule in use, in wars on land, in regard to peasants and husbandman, to whom coast fishermen may be likened, that it will doubtless continue to be followed in maritime wars to come.¹⁵²

The coastal fishing vessel exemption has benefited from the advances of codification of international instruments in the last century. It should be noted that customary rules can often be more expansive than codified rules. At the same time, a codified rule may evolve into a customary norm which is binding on non-signatories the same as signatories. This point was made by the ICJ in the *North Sea Continental Shelf Cases*.¹⁵³

1. Early Bilateral Agreements

In 1521, Britain and France agreed that "the subjects of each sovereign, fishing in the sea, of exercising the calling of fishermen, could and might, until the end of the next January, without incurring any attack . . . safely and freely, everywhere in the sea, take . . . fish, the existing war by land and sea notwithstanding."¹⁵⁴ A French ordinance of 1543 gave the admiral the power to form fishing truces with the enemy during hostilities, or of granting passports to individuals to continue their fishing trade

¹⁵² 2 ORTOLAN, *DIPLOMACY OF THE SEA*, 55 (1864).

¹⁵³ *North Sea Continental Shelf Cases* (Germany v. Denmark and Germany v. Netherlands), International Court of Justice, 1969 I.C.J. Reports 4, (Feb. 20, 1969). The Court held: a norm-creating provision which has . . . generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention.

¹⁵⁴ 4 DUMONT, *CORPS DIPLOMATIQUE*, part 1, 352-353.

unmolested.¹⁵⁵ This was an early form of bilateral/multilateral codification which applied to the parties to the conflict where reciprocity existed.¹⁵⁶

In the course of the war between Spain and England in 1793, the parties to the conflict concluded a convention establishing that no hostile act should be directed against the fishing boats of the two nations.¹⁵⁷ The agreement was nullified by an order of the British government on January 24, 1798, which instructed the English vessels to seize French and Dutch fisherman and their boats.¹⁵⁸ The French government responded to the English decree by renewing the decree of Louis XVI from 1779,¹⁵⁹ stating that despite the British actions they would not engage in reprisals.¹⁶⁰ This is significant because a reprisal by definition is an unlawful act done in response to a previous unlawful act by the opposing belligerent.¹⁶¹ Therefore, the French believed there was a legal obligation to respect the rights of fishermen even though the British did not.

The English revoked their orders to seize fishing vessels on May 30, 1800.¹⁶² It is not clear whether the British believed they had a legal obligation to refrain from seizing fishing vessels or whether this action was a matter of practicality, there being no military advantage to such action.

A full statement of the history of the exemption of fishing vessels, up to 1882, is contained in the work of De Boeck.¹⁶³ De Boeck contends that the French ordinances granting an exemption were based on the discretion of the

¹⁵⁵ The Paquete Habana, Brief for U.S. at 13.

¹⁵⁶ The admiral may in time of war accord fishing truces to the enemy and to his subjects; provided that the enemy will likewise accord them to Frenchmen. CLEIRAC, *US ET COUTUMES DE LA MER*, 544 (1661).

¹⁵⁷ *Supra* note 118.

¹⁵⁸ ORTOLAN, *DIPLOMACY OF THE SEA*, II, 51 (1864).

¹⁵⁹ *Supra* note 158.

¹⁶⁰ *Id.*

¹⁶¹ ADAM ROBERTS AND RICHARD GUELFF, *DOCUMENTS ON THE LAWS OF WAR*, 15 (2nd ed. 1989).

¹⁶² *Id.*

¹⁶³ DE BOECK, *DE LA PROPRIETE PRIVEE ENNEMIE SOUS PAVILLON ENNEMI*, 217-224 (Paris, 1882).

admiral whether to enter into an agreement with an opposing belligerent.¹⁶⁴ This would support the position that the exemption did not constitute *opinio juris*, but rather was merely based on considerations of humanity. In other words, the French believed the exemption was the right thing to do morally, but were under no legal obligation to do so.

Finally, a treaty between the U.S. and Prussia in 1785, provided that if war should arise between the contracting parties "... fishermen ... shall be allowed to continue their respective employment, and shall be unmolested in their persons ... by the armed forces of the enemy ..."¹⁶⁵

2. 1907 Hague Convention XI

The first widely ascribed to international codification of the coastal fishing vessel exemption was the 1907 Hague Convention XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War.¹⁶⁶ Article 3 of Hague XI¹⁶⁷ codified existing state practice, but still left some ambiguity. In light of the *travaux préparatoires* of Hague XI, it was believed that coastal fisheries could include those on the coast of a third state.¹⁶⁸ Additionally the term small boats in local trade was not intended to cover coastal steamers, but was directed at still smaller craft, navigating normally in territorial waters (which at the time were only 3 nautical miles), and serving purely local economic needs.¹⁶⁹ This would rule out vessels engaged in coastal trade under cabotage rules.

It should also be noted the Hague XI Convention does not provide any limits on tonnage or crew, or any special construction, type or propulsion required in order to bring a vessel within the description of a fishing vessel.

¹⁶⁴ *Id.*

¹⁶⁵ WHEATON, HISTORY OF THE LAW OF NATIONS, 306,308 (1845).

¹⁶⁶ The Hague, October 18, 1907 [hereinafter Hague XI], reprinted in THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 819-824 (Schindler & Toman eds., 3rd ed. 1988).

¹⁶⁷ Article 3 provides: Vessels used exclusively for fishing along the coast or small boats employed in local trade are exempt from capture, as well as their appliances, rigging, tackle, and cargo.

They cease to be exempt as soon as they take any part whatever in hostilities.

The contracting Powers agree not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance. *Id.*

¹⁶⁸ JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT: A TREATISE ON THE DYNAMICS OF DISPUTES- AND WAR-LAW, 586 (N.Y., Rinhart & Co., 2d ed. 1959). This was the position of the Portuguese delegate in regard to fishing off Morocco.

¹⁶⁹ *Id.*

Nor does it prescribe the limit of territorial waters or the extent of the high seas within which fishermen are allowed to ply their trade.¹⁷⁰

3. The 1936 London Protocol

The 1936 London Protocol imposed a duty on all warships to "not sink or render incapable of navigation" any merchant vessels without first making safe the ships passengers, papers and crew.¹⁷¹ An exception in the case of persistent refusal to stop when summoned or of active resistance to visit and search authorized belligerents to use force if necessary.¹⁷²

Two views can be taken regarding coastal fishing vessels in light of the London Protocol. First, that fishing vessels are lumped into the general category of merchant vessels, and therefore the protections provided for in the Convention apply to them as well. Or, second, coastal fishing vessels are *sui generis* so that the rules regarding merchant vessels do not apply per se to the coastal fishing vessels. Both positions are based on the principles of humanity and necessity, though the fishing vessel exemption seems to have a more particular humanitarian basis. Further, there exists virtually no military necessity requiring the capture of small subsistence fishermen. The protections provided by the principles of humanity and necessity are broader than those given under the London Protocol to other vessels. Nevertheless, the inclusion in Hague XI of small coastal trading vessels, which can be considered merchant vessels albeit on a smaller scale, would probably extend whatever additional protections the London Protocol may afford to coastal fishing vessels and trading vessels.

The London Protocol adds a measure of humanity against attacks on unarmed vessels which would also include fishing vessels. The Protocol, however, does not require a warship to try and make a determination whether the vessel is exempt under the coastal fishing or local trade exemption. This decision falls on the commander initiating the intercept. One safeguard to coastal fishing vessels may be the obvious circumstances encountered in making the inspection of the vessel. It should be noted, though, that the belligerent has a right to destroy captured property which it can not safely bring to port for condemnation, which is usually the case in capture by submarine.¹⁷³ In such case, seized or captured vessels may be destroyed by

¹⁷⁰ COLOMBOS, *supra* note 151 at 147.

¹⁷¹ Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22 1930. [Hereinafter referred to as the London Protocol] 31 AJIL (Supp. 137-139) (1937). See also ROBERTS & GUELFF at 147-151.

¹⁷² *Id.*

¹⁷³ See *infra*, note 196 and accompanying text.

virtue of the location in which they were captured on the basis of military necessity.

D. The Use of Military Manuals as a Source of Customary Law

Military manuals and handbooks containing operational rules are important for two reasons: first, they disseminate important normative information, and second, they are an essential component of the international lawmaking process.¹⁷⁴ Manuals are important not only for what they say, but what they do not say. Therefore the absence of a manual or the use of a manual whose content does not include the relevant norms would indicate that those norms have not been adopted.

1. Early European Manuals

In the manual used by the Dutch, it was stated: "An exception to the usage of capturing enemy's private vessels at sea is the coast fishery." The manual further stated: "This principle of immunity from capture of fishing boats is generally adopted by all maritime powers, and in actual warfare they are universally spared so long as they remain harmless."¹⁷⁵

The Austrian Naval Manual stated: "Regarding the capture of enemy property, an exception must be mentioned, which is a universal custom. Fishing vessels which belong to the adjacent coast, and whose business yields only a necessary livelihood, are, from considerations of humanity, universally excluded from capture."¹⁷⁶

The Naval Schools of Spain adopted, by royal decree, the text written by Ignacio de Negrin, wherein he wrote: "[T]he customs of all civilized peoples excludes from capture, and from all kind of hostility, the fishing vessels of the enemy's coasts . . . It has been thus expressed in very many international conventions, so that it can be deemed an incontestable principle of law . . ."¹⁷⁷

¹⁷⁴ W. M. Reisman and W. K. Lietzau, *Moving International Law from Theory to Practice: the Role of Military Manuals in Effectuating the Law of Armed Conflict*, in *THE LAW OF NAVAL OPERATIONS*, 64 INTERNATIONAL LAW STUDIES 1 (Horace B. Robertson, Jr., ed., 1991).

¹⁷⁵ JAN H FERGUSON, *MANUAL OF INTERNATIONAL LAW FOR THE USE OF NAVIES, COLONIES AND CONSULATES*, 212 (1882).

¹⁷⁶ FERDINAND ATTMAYR, *MANUAL FOR NAVAL OFFICERS*, 61 (Vienna, 1872).

¹⁷⁷ IGNACIO DE NEGRIN, *ELEMENTARY TREATISE ON MARITIME INTERNATIONAL LAW*, 310 (Madrid, 1873).

From examining the above manuals it is clear that the practice of specially affected states, those with significant coastal fisheries and navies, supported the eventual codification of the coastal fishing vessel exemption.

2. The 1913 Oxford Manual

Military manuals are not just a product of the armed forces. Non-governmental organizations have also attempted to influence state practice by compiling lists of norms which they believe comport with custom and state practice. One early attempt at compiling a list of norms was the 1913 Oxford Manual on the Laws of Naval War.¹⁷⁸ The Oxford manual was prepared and adopted by the Institute for International Law as a comprehensive work on what the state of the law of naval warfare was at the time.

Article 47 of the Oxford Manual essentially restated the 1907 Hague XI rules on coastal fishing vessel exemption from capture.¹⁷⁹ In his commentary to Article 47, Ronzitti stated that: "A new norm . . . allows a belligerent to prevent enemy ships over which he has no right of seizure or capture from entering on the high seas the zone corresponding to the present sphere of action of his operations."¹⁸⁰ This would seem to strengthen the exemption against capture by providing the naval commander with a means to prevent the exemption from hindering his operations. This is a simple balancing of interests, the right of the coastal population to continue subsistence fishing and coastal trading, with the needs of the naval commander in ensuring accomplishment of his mission. Even though this balancing adds another qualification to the exemption, in essence requiring vessels to remain out of areas restricted by military necessity, a total ban on fishing such as we saw during the Korean conflict would presumably no longer be permissible.

3. The United States Navy Manuals

One of the U.S. Navy's first military manuals, written by Charles H. Stockton, included a reference to the coastal fishing vessel exemption as follows: "All merchant vessels of the enemy, except coast fishing vessels innocently employed, are subject to capture unless exempt by treaty stipulations."¹⁸¹ A subsequent manual used by the U.S. Navy, NWIP 10-2,

¹⁷⁸ The 1913 Oxford Manual on the Laws of Naval War Governing the Relations Between Belligerents is reprinted in N. RONZITTI, *THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES* (1988).

¹⁷⁹ Article 47 states: Vessels engaged exclusively for fishing along the coast, or for local trade, . . . are exempt from seizure. *Id.* at 299.

¹⁸⁰ RONZITTI, *supra* note 178 at 335.

¹⁸¹ CHARLES H. STOCKTON, *THE LAWS AND USAGES OF WAR AT SEA*, Article 14 at 11 (GPO, 1900).

provided: "[S]mall coastal (not deep-sea) fishing vessels and small boats engaged in local coastal trade not taking part in hostilities are exempt from destruction or capture."¹⁸² It should be noted that this is the first time the distinction between deep-sea fishing vessels and coastal vessels appeared.

The U.S. Navy's current manual, "The Commander's Handbook on the Law of Naval Operations,"¹⁸³ is considered a model statement on the international law of naval warfare. The handbook was first published in 1987 as a replacement for the Navy publication "Law of Naval Warfare,"¹⁸⁴ and has undergone two revisions to reach its current edition.¹⁸⁵ The handbook addresses the exemption of small coastal fishing vessels in general terms along the lines of Hague XI.¹⁸⁶

4. The 1995 San Remo Manual

Perhaps the most ambitious attempt at providing a contemporary restatement of international law applicable to armed conflict at sea is the San Remo Manual.¹⁸⁷ This manual was prepared over a six year period, 1988-1994, by a group of international lawyers and naval experts who all participated in their personal capacities. The participants viewed this manual as a modern equivalent to the Oxford Manual.¹⁸⁸

In its discussion of the coastal fishing vessel exemption the San Remo Manual does three things. First, it lists the vessels and activities entitled to exemption from attack. Second, it lists how an exempt vessel can lose its exemption. And third, it lists what procedures a belligerent may take for vessels that have lost their exemption.

¹⁸² U.S. Dept. of the Navy, Naval Warfare Information Publication 10-2 (NWIP 10-2), LAW OF NAVAL WARFARE, para. 503(c)(6), at 5-6 (GPO 1955).

¹⁸³ Commander's Handbook, *supra* note 116.

¹⁸⁴ *Supra* note 182.

¹⁸⁵ It should be noted that the predecessor of NWP 1-14M, the NWP 9A, has been translated into Arabic and Spanish and widely distributed to other nations for incorporation into their respective naval operations manuals.

¹⁸⁶ NWP 1-14M, para. 8.2.3, at 8-4. "Specifically exempted vessels . . . include: (5) Small coastal (not deep-sea) fishing vessels and small boats engaged in local trade."

¹⁸⁷ SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICT AT SEA (Cambridge Univ. Press, 1995).

¹⁸⁸ *Id.* at 5.

Article 47(g) includes small coastal fishing vessels and small boats engaged in local coastal trade as vessels exempt from attack.¹⁸⁹ In the commentary to this paragraph, the manual bases the exemption from attack on the fact that disruption of this fishing would give no significant benefit to the belligerent. Further, it would harm the population in violation of the prohibition against removing the local populations source of sustenance as found in Protocol I, Article 54.¹⁹⁰

The San Remo manual attempts to define "coastal" fishing vessels, but does so in terms that are still somewhat vague.¹⁹¹ The manual also reiterates the distinction made between boats which serve a local need and deep-sea vessels. It does so by noting that "although deep-sea fishing vessels are not specifically exempt from attack, they cannot normally be attacked as it is unlikely that they would be military objectives if they are genuinely exclusively engaged in this activity."¹⁹² The proponents of economic warfare may disagree given the war-sustaining enterprise many of these vessels may be engaged in.

The San Remo manual provides insight into more recent state practice by its assertion that "local vessels are to be subject to the regulations of a belligerent naval commander operating in the area and to inspection."¹⁹³ Herein lies a practical measure which balances the interest of the naval commander in accomplishing the mission with the humanitarian needs of a population to fish for subsistence. The authors go on to elaborate that the coastal fishing vessels should identify themselves on request, be open for inspection and obey any other regulations that the commander needs to institute.¹⁹⁴ Additionally, "the restrictions should be limited to what is necessary and should not in practice disrupt the activities of these vessels to such a degree that it would undermine the purpose of the rule granting immunity from attack and capture."¹⁹⁵

¹⁸⁹ *Id.* at 125-126.

¹⁹⁰ *Id.*, para. 47.46, at 134.

¹⁹¹ *Id.*, para. 47.47 defined as fishing vessels that are operating near the coast, which does not mean that they have to be right next to the coast, but can operate several miles offshore.

¹⁹² *Id.*, para. 47.48.

¹⁹³ *Id.* at para. 47.51. Citing NWP 9A, The Commanders Handbook, para 8.2.3, at 8-19, and the Canadian Draft Manual, Para. 718, at 7-24.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

As under existing customary law and subsequent codification in Hague XI, the exemption from capture and targeting listed in the San Remo manual is a conditional exemption.¹⁹⁶ The manual incorporates a conjunctive 3-part test to establish whether an exemption is permitted. The first condition corresponds with well established practice, that is, the vessels are innocently employed in their normal role.¹⁹⁷ Second, that they submit to identification and inspection when required.¹⁹⁸ This comports with the 1936 London Protocol requirement and provides belligerents with a precautionary measure to ensure compliance with the conditions granting the exemption. Finally, the third provision is that the vessels not intentionally hamper the movement of combatants and obey the orders to stop or move out of the way when required.¹⁹⁹ The commentary to this provision states that this duty enables belligerents to carry out their military actions when needed. As an implied corollary to this duty to move when required, is the right of the belligerent to utilize unit self-defense if necessary.

The last applicable portion of the manual deals with the procedures to follow should a vessel exempt from attack lose its protection because it has breached one of its conditions of protection described above.²⁰⁰ The manual provides that a vessel that has lost its exemption may only be attacked if "diversion or capture is not feasible,"²⁰¹ "no other method is available for exercising military control,"²⁰² and adds the requirement of military necessity²⁰³ and proportionality²⁰⁴ be included in the balancing of action to be taken. Ideally, it is always a general rule of armed conflict to use the minimum force necessary to achieve a military objective. This prudent use of force corresponds to the principle of economy of force. In summary, the San Remo manual rules comport with the custom and practice of states and reinforces the norm exempting coastal fishing vessels from capture or attack.

¹⁹⁶ *Id.*, Article 48, at 136.

¹⁹⁷ *Id.*, Article 48(a).

¹⁹⁸ *Id.*, Article 48(b).

¹⁹⁹ *Id.*, Article 48(c).

²⁰⁰ *Id.*, Article 52.

²⁰¹ *Id.*, Article 52(a), at 141.

²⁰² *Id.*, Article 52(b).

²⁰³ *Id.*, Article 52(c), "the circumstances of non-compliance are sufficiently grave that the vessel has become, or may be reasonably assumed to be, a military objective . . ."

²⁰⁴ *Id.*, Article 52(d), "the collateral casualties or damage will not be disproportionate to the military advantage gained or expected."

III. THE RELEVANCE OF BLOCKADE LAW

A. Blockades During Wartime

The concepts of war-fighting, war-sustaining, and non-military or free goods, has begun to blur as the industrialization of the world has changed the nature of society. One of the early attempts to expand the concept of war-sustaining material was during the Franco-Prussian war in 1870, when Bismarck "remonstrated against the shipment of coal from England to France."²⁰⁵ Certainly most would agree that the supply of coal is important to sustain the military, both directly by powering trains which move fighting men and material, but also to power the industry which produces the war-fighting material. Yet how do we determine what is or may be used to assist the war effort? Historically, the determination as to what was and was not subject to being used in the war effort was made on a facts and circumstances basis. Moseley believed there was a presumption of innocent use when he stated:

It is not only, or not so much, whether the goods are in themselves, or as belonging to a class, capable of being applied to a military or naval use, but whether, from all the circumstances connected with them, those very goods are or are not destined for such use.²⁰⁶

With the emergence of the concept of total war, in which virtually every sector of society is mobilized to support the war effort, the right of one belligerent to cut off what was previously not considered war-sustaining material from the opposing belligerent expanded. This expansion included any foodstuffs.²⁰⁷ The affect was to further limit the exemption of small coastal fishing vessels from capture. This limitation was certainly a geographic one, for although the U.S. Supreme Court overturned the seizure of the *Paquete Habana* and vessels like her during the Spanish-American war, vessels which were operating many miles from port, state practice during and since World War I quickly demonstrated that vessels fishing far from the coast would be considered engaged in a war-sustaining industry.

Blockade is a belligerent operation to prevent vessels of all nations, enemy as well as neutral, from entering or exiting the ports or coast under the

²⁰⁵ Snow, NAVAL WAR COLLEGE LECTURES *supra* note 106 at 136.

²⁰⁶ *Id.*

²⁰⁷ Food was not always considered a war-sustaining supply as evidenced by the statement of Robert Lansing, Acting Secretary of State, to the Ambassador in Great Britain, that the U.S. had always insisted that foodstuffs were legitimate articles of commerce, and that mere destination to an enemy port did not justify their seizure or confiscation. The Dept. of State, II Policy of the United States Toward Maritime Commerce in War 1914-1918, 197-205 (GPO, 1936).

control of an enemy nation.²⁰⁸ The purpose in establishing a blockade is to deny the enemy the use of vessels to transport personnel and goods to or from enemy territory.²⁰⁹ Blockade is distinguished from the belligerent right of visit and search, which is designed instead to interdict the flow of contraband goods into enemy territory.²¹⁰ The right of visit and search may be exercised anywhere outside of neutral territory.²¹¹

The law of war allows goods destined for enemy use to be captured as contraband.²¹² Contraband consists of all goods which may be susceptible to use in war.²¹³ Contraband goods were traditionally divided into two categories: absolute and conditional. Absolute contraband consists of goods which are used primarily for war, whereas conditional contraband are goods which are equally susceptible to either peaceful or warlike purposes. Under modern conditions of warfare the distinctions have become blurred.

The present practice of nations in time of war is for the government to take control of the distribution of all products.²¹⁴ From these resources the government meets defense needs first, and then those of the civilian population as best it can. The published contraband lists of World War II proved that the concept of "free goods," those not subject to seizure, had virtually disappeared, because the contraband lists included practically every item imaginable.²¹⁵ Arguably, this being the case, fish caught by coastal fishermen would be contraband and thus not exempt from capture.

Another issue arises when a determination is made to capture or seize these fishing vessels, that is, what to do with them. In a belligerency, captured vessels become a prize which removes any right of ownership the enemy may have. But as argued during the *Paquete Habana* case, these small fishing vessels have little value and become a burden to take to a suitable port because they often lack seaworthiness and hinder military operations. The result is that

²⁰⁸ NWP 1-14M, para. 7.7.1, at 7-7.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 7-7 and 7-8.

²¹¹ *Id.*

²¹² BRITTIN, *supra* note 2 at 276.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

these captured vessels may be destroyed by virtue of military necessity when they cannot be brought into port.²¹⁶

In as much as blockade and the right of visit and search constitute economic warfare, it affects the scope of the exemption on coastal fishing vessels. Certainly any trade between nations is relevant, even in the case of a boat crossing the mouth of an international river boundary to deliver goods to a neighboring nation across that river. Given the post-Charter embargo enforcement mechanisms, this boat -- whether a fishing vessel offloading its catch in the other country, or a small coastal trader delivering trade goods -- would be subject to seizure/capture for violating any relevant United Nations Security Council Resolution imposing an embargo on the state.

Blockades, over time, were established further from the coastline. In part this was due to the development of weapons which made it precarious for vessels to remain close to the coast.²¹⁷ The coastal fishing vessel exemption benefited by increasing the freedom of conducting fishing in truly coastal waters without interfering with the activities of the belligerents. The vessels had the freedom to operate within the inner limits of the blockade and thus were more analogous to the farmers of the nation, even if they were producing food which might feed the military. Generally, unless there was supremacy of the seas, like during the Korean war, these vessels were not subject to attack so long as they did not take part in military activities.

An additional issue which might take place in this microcosm is the concept of continuous voyage by transshipment. These issues are not theoretical postulates, we have seen this before during operations in Vietnam,²¹⁸ and we have encountered these same issues in conjunction with the UN embargoes of Haiti and Iraq. In fact, Iraq has violated the UN imposed oil embargo by shipping oil via small vessels, through their territorial seas to neighboring Iran.²¹⁹

²¹⁶ Commanders Handbook, para. 8.2.2.1, at 8-2. It may also be recalled that during the Korean war, warships often hoisted seized vessels aboard where practicable, *See supra* note 60.

²¹⁷ D. P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA*, at 1151-1156 (1984).

²¹⁸ *Supra* note 100 and accompanying text.

²¹⁹ *U.S. Admiral Says Iraq, Aided by Iran, Is Selling Oil Despite Ban*, N.Y. Times, p.7 (Feb. 12, 1997). The vessels violating the embargo include not only small tankers, but other smaller vessels that flood their ballast tanks and compartments with oil and then hug the Iranian coast as they steam southward. To date, all interception operations have been restricted to international waters outside Iranian territorial seas. Almost 30 vessels have been identified making these runs. Additionally, in February 1997, there were 2 confrontations, one in which a tanker rammed a U.S. frigate, and another incident when an Iranian missile patrol boat appeared at the scene of an embargo enforcement interception by the USS Nicholson. It should be noted that this article incorrectly stated that the Iranians have a 15 mile territorial sea, they only have a 12 mile territorial sea. *See also Navy Tries to Halt Iraqi Oil Smuggling*, Baltimore Sun, p. 27 (Feb. 22, 1998, and *The Dhows that do the Iraqi Run*, The Economist, (April 25- May 1, 1998).

B. Embargoes Under the U.N. Charter

A measure that must be distinguished from blockade as used by belligerents is the pacific blockade. This blockade is used only in time of peace, usually by a group of states, to coerce some sort of state action.²²⁰ The legality of pacific blockade is questionable unless taken pursuant to authorization of the United Nations Security Council.²²¹ The reason for this, is due to the methods and means of enforcing the pacific blockade. Under the United Nations Charter, nations are prohibited from using force or the threat of the use of force against other countries except in self-defense or as authorized by the United Nations Security Council.²²² An example of a commander's predicament when faced by a resolute blockade/embargo runner, and no UN authority to use force, was witnessed by the HMS *Berwick* on 4 April 1966 while on duty in support of United Nations sanctions against Rhodesia. The British vessel boarded a Greek tanker, the *Joanna V*, en route to the port of Beria, and ordered the ship to divert.²²³ When the ship refused, the British had no ability to prevent her entering port. The Security Council rectified the problem by authorizing the use of force to prevent embargo running and ordered the *Joanna V* to be seized when she left port.²²⁴

1. The UN Embargo of Iraq

The best example of the United Nations powers in regard to an embargo, took place during the Persian Gulf war in 1990-1991. Utilizing its power under Article 41²²⁵ of the Charter, the UN Security Council passed a Resolution forbidding UN member states to import goods into Iraq or Kuwait, export from those countries, or make economic or financial resources available to them.²²⁶ Since under Article 41 force was not authorized to enforce the

²²⁰ BRITTIN, *supra* note 2 at 275.

²²¹ *Id.*

²²² U.N. Charter Article 51.

²²³ O'CONNELL, THE INFLUENCE OF THE LAW ON SEA POWER at 174-175.

²²⁴ *Id.* See also UNSCR 221 (XX) (1966).

²²⁵ Article 41 of the Charter specifically limits itself to measures not involving the use of armed force, although blockades are specifically mentioned as an enforcement measure available under Article 42. Charter of the United Nations, June 26, 1945, arts. 41-42, 59 Stat. 1031, 1 U.N.T.S. xvi, T.S. No. 993 [hereinafter U.N. Charter].

²²⁶ S.C. Res. 661, U.N. Doc. S/RES/661 (1990), reprinted in 29 I.L.M. 1325 (1990).

embargo, subsequent resolutions were needed to ensure compliance with 661. The maritime interception operation (MIO), as the enforcement operation was called, began on 16 August 1990. The U.S. issued instructions to its warships the day the MIO began to stop, board, and search suspect vessels.²²⁷ They were also instructed that if the ships failed to respond to signals to stop, the use of minimum force was authorized to stop them.²²⁸ The first shots were fired on 18 August across the bow of an Iraqi tanker that refused to alter its course.²²⁹ The warning shots failed to influence the Iraqis and despite the authority to use disabling fire, it was not used and the tanker continued its voyage.

The unilateral authorization to use force did not provide the U.S. MIO forces with the political fortitude to take more forceful measures than warning shots. Instead, the U.S. waited for international consensus on the appropriate level of force to use. Since this was a UN enforcement operation it was believed that the UN should sanction the use of more forceful measures to enforce the embargo. This authorization to use force came with Security Council Resolution 665.²³⁰ Armed with the authority to use force, the multinational naval force began its mission to stop the flow of oil out of Iraq and preclude the import of war material into the country.²³¹

It wasn't until two weeks after the first futile warning shots were fired that on 31 August, the first Iraqi vessel was boarded as it headed for Aqaba, Jordan.²³² The first Iraqi vessel diverted was the *Zanoobia* which was boarded

²²⁷ FREEDMAN, THE GULF CONFLICT, 1990-1991: DIPLOMACY AND WAR IN THE NEW WORLD ORDER 145 (1992).

²²⁸ *Id.*

²²⁹ *Infra* note 231 (Navy Report). USS *Reid* (FFG-30) fired the shots, but no boarding was conducted.

²³⁰ UNSC 665, U.N. Doc. S/RES/665 (1990), reprinted in 29 I.L.M. 1329 (1990). The language of 665 is unique because it was influenced by the fear of the Soviets and Chinese to allow the phrase "minimum use of force." Instead they preferred to spell out precisely the nature of the authority given by the UN. The resolution thus called upon member states deploying maritime forces in the area:

[T]o use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward shipping in order to inspect and verify their cargoes and destinations and to insure strict implementation of the provisions related to such shipping laid down in Resolution 661. FREEDMAN at 149.

²³¹ Dept. of the Navy, The United States Navy in Desert Shield and Desert Storm, at 21 (15 May 1991).

²³² *Id.* at 22.

on 4 September.²³³ The interesting point about this diversion was the cargo. Since it was primarily foodstuffs, the issue was hotly deliberated in the UN Sanctions Committee.²³⁴ Iraq imported 75 per cent of its food requirements.²³⁵ Nevertheless, a commitment to thorough sanctions was made which included barring two Bulgarian ships laden with twenty-six containers of baby food destined for Iraq from leaving the port of Hamburg, Germany.²³⁶ It was well understood that in a totalitarian regime like Iraq's, if the distribution of food was left up to the Iraqi leadership, then there was good reason to believe that it would likely go to feed Iraq's political elite and military first. In fact, Saddam made it clear that because of the threat of American military action, Iraq's armed forces would get first call on supplies of all commodities.²³⁷

By the end of the Persian Gulf war, the MIO force conducted over 7,500 challenges to ships, boarded 965, and diverted 51 vessels.²³⁸ Surprisingly, warning shots were fired only 11 times, and no disabling fire was used.²³⁹ The affect of the UN embargo on the coastal fishing vessel exemption was minimal. This was in part because of the small coastal area which Iraq controlled, and the total sea control exercised by the coalition MIO force. Additionally, Iraq had a very small fishing industry and never ventured out far enough to encounter coalition warships. Had any coastal trade taken place between Iraq and its neighbors this would have undoubtedly been halted by the MIO force. Given the commitment to enforce the embargo, it is also certain that any Iraqi fishing vessels would have been seized as would any other nations' fishing vessels observed dealing with the Iraqis, on the basis that food supplies were forbidden goods.

2. The UN Embargo of Haiti

In contrast to the enormous effort taken to enforce UN Resolutions 661 and 665, are the operations conducted under UN auspices during the embargo of Haiti. Acting under the recommendation of the Organization of

²³³ *Id.* The vessel carried only tea, but it was enough to supply the entire population of Iraq for a month.

²³⁴ FREEDMAN, at 191 note 8.

²³⁵ *Id.* at note 6.

²³⁶ FREEDMAN at 192. This took place during the first week of September 1990.

²³⁷ *Id.*

²³⁸ *Id.* at 153. Ninety percent of the diversions and boardings took place in the Red Sea as the Iraqis tried to slip cargoes out of the Jordanian port of Aqaba.

²³⁹ *Id.*

American States, a trade embargo was instituted on 23 June 1993, by Security Council Resolution 841.²⁴⁰ A MIO was established much like the one used in the Persian Gulf war and ships were warned through Notice to Mariners (NOTMARs) that an embargo was in place and that force would be used to prevent violations. The MIO enforcement rules allowed for warning shots and disabling fire to be used along with "shouldering," a technique wherein a vessel maneuvers to block the transit of an approaching vessel. The boundary lines for the embargo were provided in the NOTMARs. Vessels were not boarded unless they breached the boundary lines. During the embargo of Haiti, approximately 700 vessels were boarded. Of that number only 5 vessels were detained, although in one case detained meant a period of one year. The flag state of the detained vessel was notified whenever a boat was detained. The rules for detaining vessels required that they had to have violated 2 prior warnings, meaning that they had previously attempted to run the embargo, been boarded, and warned. The detained vessels were taken to the US naval base at Guantanamo Bay, Cuba.

When the embargo first began, US forces were enforcing the embargo right up to the Haitian shore. Eventually, though, US forces were pulled out to 3 nautical miles from shore under orders from the National Command Authority. At this point the embargo became much less effective as numerous vessels in the 30-40 foot range operated in-shore in violation of the embargo. The largest vessel which was boarded during the embargo was a 60 foot ocean-going tug. Clearly many of these vessels would fit the description of coastal fishing vessels and trading vessels, but just as clear is the fact that they were violating the UN embargo, and as such lost their exemption from seizure. One interesting note remains, that once again no disabling fire was used to enforce the embargo, although some warning shots were fired.²⁴¹

IV. PRINCIPLES AND GUIDELINES TO SUPPORT THE COMMANDER

A. The Use of Force

This issue involves both offensive and defensive aspects of the application of force. First, I would like to discuss offensive parameters, in essence what will pass legal muster as it relates to preventing violations of the coastal fishing vessel exemption. Any discussion, though, must first begin with

²⁴⁰ U.N. Doc. S/RES/841 (1993). (16 June 1993).

²⁴¹ The majority of this operational information was passed to the author by Lt Col John Kirkland, USMC, Office of the Staff Judge Advocate, U.S. Atlantic Command, on 8 April 1997. The operational records for the period of the Haitian embargo have been transferred to the US Southern Command as they assume operational responsibility of the Caribbean region.

the premise that any fishing vessel which engages in any activity in direct support of the enemy loses its exemption.²⁴²

1. Mission Accomplishment

The naval commander has the right to search any vessel, except sovereign immune vessels, to determine if they are actively supporting an opposing belligerent. This is a right of belligerents traditionally exercised only during armed conflict, but which has become a practice of states during 20th century conflicts not amounting to declared wars. Those vessels which are found to be carrying contraband have violated the exemption from capture and can therefore be seized. If the vessel refuses to stop when summoned and resists visit and search, the vessel falls outside the protection of the London Protocol. In this circumstance the vessel takes on enemy character allowing the use of force against the vessel.

Vessels which refuse to stop may be pursued, if they are believed to have violated the coastal state laws or have breached or attempted to breach an embargo or blockade, under the right of hot pursuit.²⁴³ If the vessel has entered the territorial waters of a third state or a neutral and no agreement allows for a continuation of the pursuit, there may still be a right of pursuit under the doctrine of self-help or rules of engagement that permit the right of immediate pursuit.

Although fishing vessels may be unarmed and therefore not a threat from a self-defense point of view, if the vessel attempts to avoid capture by evading toward shore or a third nations territorial waters, it becomes a lawful target and can be engaged. Often times in-shore pursuit is difficult due to navigational constraints. If this is the case what degree of force may be employed to terminate the pursuit? A number of factors will affect the right to resort to force.

If the vessel is fleeing to the high seas, you may continue hot pursuit, but you may have already accomplished the mission by preventing the vessel's entry. If the vessel is escaping to the high seas what level of force may you take to prevent the vessels escape? In other words, when does a sufficient level of necessity occur to require the use of force? Unless this is a self-defense situation, only that degree of force which is necessary may be used to effect an arrest or seizure.

A classic case of excessive force is that involving the Canadian vessel *I'm Alone* which was engaged in smuggling liquor into the United States during

²⁴² See API, Article 51(3), and 1907 Hague XI, Article 3.

²⁴³ See 1982 U.N. Law of the Sea Convention, Article 111.

Prohibition.²⁴⁴ The vessel was intercepted by a U.S. Coast Guard vessel which could not overtake the fleeing *I'm Alone* as it headed out on the high seas. The hot pursuit extended 200 miles into the Gulf of Mexico.²⁴⁵ The vessel was ordered to stop and was told if it did not it would be sunk. After warning shots went unheeded, the Coast Guard vessel fired enough shots into the hull of the *I'm Alone* to sink her. The case went to arbitration, wherein the commissioners found that the use of necessary and reasonable force in visit and search was permissible, even if the vessel pursued was sunk, but the facts of this case were held not to justify the sinking.²⁴⁶ The doctrine of excessive force, which originated in this decision, remains a factor in the determination of whether peacetime use of force is permissible.

2. The Right of Self-Defense

All nations retain the right of self-defense in accordance with Article 51 of the United Nations Charter. The proliferation of modern weapons into the hands of more and more nations increases the threat to naval forces operating in the near-shore littorals.²⁴⁷ This being the case, measures must be taken to ensure that forces do not assume too great a risk in carrying out their mission. One measure which has been used by U.S. forces is the establishment of warning zones around vessels. Notices are given to both Mariners and Airmen warning them that if they approached closer than an established distance they would be at greater risk unless they identified their intentions.²⁴⁸ These were used extensively during the U.S. presence near Beirut, Lebanon in 1982-84 and the Iran-Iraq tanker war, 1980-1988 in the Persian Gulf. The voice and radio warnings were often followed by warning shots of tracer fire or flares as a visual warning. If the unidentified vessel continued its approach weapons were to be brought to bear on the vessel. The procedures were utilized on a number of occasions, and at least on one occasion resulted in the engagement of an unarmed fishing vessel from the United Arab Emirates.²⁴⁹

²⁴⁴ The *I'm Alone*, 3 U.N.Rep.Int'l Arb. Awards 1609 (1935).

²⁴⁵ *Id.*

²⁴⁶ O'CONNELL, *supra* note 223 at 65-66.

²⁴⁷ See generally, M. MORRIS, EXPANSION OF THIRD-WORLD NAVIES, 67-78 (1987), for a discussion of the increasing proliferation of modern weapons and weapons platforms to developing states since the mid-1960s.

²⁴⁸ See SECNAVINST 2110.3, Special Warnings to Mariners.

²⁴⁹ ANDRE DE GUTTRY AND NATALINO RONZITTI, THE IRAN-IRAQ WAR AND THE LAW OF NAVAL WARFARE (1980-1988), 109 (1993).

The concern that fishing vessels could be used for military purposes and thus not subject to exemption, is as old as the exemption itself. Hall, in discussing the exemption stated, "it must at the same time be recognized that fishing boats are sometimes of great military use. . . Any immunity which is extended . . . must be subject to the conditions that [the objects thereof] shall not be suddenly converted into noxious objects at the convenience of the belligerent."²⁵⁰

B. The Use of Exclusion Zones

The use of exclusion zones to restrict or regulate the presence of fishing vessels is not without peril and is not a panacea for solving infiltration problems. The practice of using zones is well established by state practice. During the civil war in China, the People's Republic of China (PRC) declared prohibited zones in their coastal waters. The PRC warships enforcing the prohibition, seized 158 Japanese fishing vessels between 1950 and 1954.²⁵¹ In their civil war in Algeria, the French declared a 20-50 kilometer customs zone off Algeria for small craft in order to prevent the smuggling of war material to the rebels.²⁵² France justified these actions on self-defense grounds.²⁵³ It was without question that arms were smuggled in by fisherman.²⁵⁴ Another measure used to prevent infiltration was India's restriction on neutral vessels approaching closer than 75 miles to the Pakistani coast after dark.²⁵⁵

The use of exclusion zones as a factor in determining whether a vessel is a threat to ones forces will only permit friendly forces to act in immediate self-defense. For example, during the Falklands conflict, the British established a total exclusion zone (TEZ) around the Falkland Islands.²⁵⁶ The

²⁵⁰ W. E. HALL, TREATISE ON INTERNATIONAL LAW, 468-469 (4th ed.).

²⁵¹ BRUCE SWANSON, EIGHTH VOYAGE OF THE DRAGON 186 (1982).

²⁵² D. P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 805-806 (1982).

²⁵³ 4 WHITEMAN, DIGEST OF INTERNATIONAL LAW 513-514 (1965), reprinting telegram of U.S. Ambassador to France Amory Houghten to Secretary of State Dulles, Jan. 26, 1958.

²⁵⁴ 10 KESING'S CONTEMPORARY ARCHIVES 15277 (1956); 11 *Id.* 16080, 16184 (1958).

²⁵⁵ Walker, "State Practice Following World War II, 1945-1990," in Grunawalt, *The Law of Naval Targeting: Targeting Enemy Merchant Shipping*, 65 INTERNATIONAL LAW STUDIES 121, 144 (1993).

²⁵⁶ CHURCHILL AND LOWE, THE LAW OF THE SEA, 308 (2d ed. 1988).

exclusion zone applied to all ships and aircraft.²⁵⁷ Any military or civilian ships or aircraft found within the zone without due authority from the Ministry of Defense in London were to be regarded as hostile and liable to attack by British forces.²⁵⁸ The fact that a vessel is operating in an exclusion zone, however, does not automatically make the vessel a lawful target. The principle of discrimination must still be complied with.²⁵⁹ Therefore, positive identification of the vessel must be made to determine whether it has lost its exempt status. The British would have violated the principle of discrimination had they carried out unrestrained attacks on any vessels in the exclusion zone.

Mere presence in the exclusion zone does not constitute necessity to attack an unidentified fishing vessel, except in the case of self-defense. To respond to the mere presence with force would also violate the principle of proportionality, because the proportionate response may be to intercept the interloper, stop and inspect, then reroute the vessel if entitled to an exemption from capture. Fortunately, the vessel density in the South Atlantic during the Falkland conflict did not lend itself to indiscriminate attacks. Additionally, the use of exclusion zones, wherein any vessel enemy, neutral or merchant could be attacked was found to be illegal by the Nuremberg Tribunal which stated:

The proclamation of operational zones and the sinking of neutral merchant vessels which enter those zones presents a different question The order of Doenitz to sink neutral ships without warning when found in these zones was, therefore, in the opinion of the Tribunal, a violation of the (1936) Protocol.²⁶⁰

Other measures which may be taken to control entry into prohibited zones is simply to take away the particular vessels fishing privileges, something which an allied government could do in a limited war situation, but which might prove impractical in operations along an opposing belligerent's coast.

C. Suggested Operational Guidelines

²⁵⁷ The Total Exclusion Zone debate in the House of Commons is cited in, Parliamentary Debates (Hansard), House of Commons, 6th series, vol. 22, col. 296 (28 April, 1982).

²⁵⁸ *Id.*

²⁵⁹ Protocol I, Article 48 provides that: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." SCHINDLER & TOMAN, THE LAWS OF ARMED CONFLICT 650 (1981).

²⁶⁰ Trial of the Major War Criminals before the International Military Tribunal at Nuremberg, 22 Nuremberg 558 (1948).

How does a commander faced with such a challenge make the mission of interdiction easier? A number of things can be done. Restrictions placed on the fishing fleet and other small craft traffic would prove useful and cut down the number of craft to be kept track of and perhaps the number of hours of patrolling.²⁶¹ Marking systems for identification of vessels would also be helpful. The Philippine government, faced with the Hut insurgency, required the numbering of all vessels so that their home ports and provinces could be identified.²⁶² One restriction placed on boats operating at night in Vietnam was the requirement to operate with their lights on.²⁶³ Additionally, the concept of requiring all boats to carry some sort of transponder to make it readily locatable was proposed as early as 1972.²⁶⁴ With today's technology this may be a realistic option.²⁶⁵

Faced with a mandatory identification requirement the enemy is confronted with the dilemma of whether to carry the device or not. If he carries it, detection will be more certain; if he does not carry it, then he is automatically suspect when detected. The following are suggestions for any in-shore operation.

1. When operating under the auspices of collective self-defense, the coastal state being supported should establish a defensive security zone in its territorial sea, which forbids all unauthorized foreign vessels from operating there.²⁶⁶ This will reduce vessel density allowing naval forces to concentrate efforts in-shore.
2. Within the territorial sea, prohibited areas should be published and notification provided to all vessels.

²⁶¹ The Naval Ordnance Lab report cited *supra* at note 73, suggested that violators of a curfew or a restricted zone would be immediately suspect and could perhaps be fired upon without inspection. *Id.* at 6. This would unquestionably violate the obligation of distinction unless the unit engaging the vessel was acting in self-defense.

²⁶² *Id.*

²⁶³ Information conveyed by Prof. Frank Uhlig to the author via telephone on 4 March 1997.

²⁶⁴ *Supra* note 261.

²⁶⁵ In the mid- and late- 1980's, the US National Marine Fisheries Service placed 800 transponders on Japanese, Taiwanese, and Korean high seas drift net vessels to monitor fishing activities in the North Pacific. Brett Schneider, Effectiveness of Fishing Vessel Surveillance, 20 COLP Proceedings 79 (1996).

²⁶⁶ Law of the Sea Convention, U.N. Doc. A/CONF.62/122, article 25(3), (1982), reprinted in 21 I.L.M. 1261-1354 (1982) [hereinafter LOSC].

3. A study of fishing practices should be undertaken to formulate specific operational criteria which are the least restrictive measures available to accommodate subsistence fishing.
4. Vessel identification and registration requirements should be established, with consideration for the use of remote surveillance systems such as transponders and special radar reflective or infrared highlighted vessel markings.
5. Fishing vessels violating restricted areas should be seized or detained, using the minimum force necessary.
6. In the interests of self-defense, establish closed fishing areas near high-risk assets and mark them well for both night and day.
7. Use-of-force measures authorizing warning shots, disabling fire, and deadly force should be provided for.

V. CONCLUSION

Although the term coastal fishing is not expressly defined in Hague XI, state practice and judicial decisions have construed the exemption very strictly. It is evident that the exemption originated out of both humanitarian concerns and military practicality. In its evolution, the exemption has seemed to be subsumed by military necessity, in part by the expanding concept of war-sustaining goods, and by the increased threat of modern military technology.

The post-Charter power of the UN Security Council to impose sanctions and the corresponding widening of the concept of economic warfare to include food, a fungible commodity which could be used to feed combatants, will certainly limit the exemption to only the smallest coastal fishing vessels operating in-shore and undoubtedly restrict all extraterritorial coastal trading. Although attempts have been made in Protocol I to limit the use of food as a weapon, recent state practice, authorized by a UN Security Council Resolution,²⁶⁷ may limit Protocol I to merely a prohibition on the destruction of civilian means of agricultural production.

The 1982 Law of the Sea Convention may also impact the exemption by expanding the limits of the territorial sea from 3 nautical miles to 12, thus pushing the concept of coastal out to that limit. It should be remembered that the distance from shore alone may not be determinative, for it is the means of fishing that seem most relevant to the exemption. Therefore, it appears the size of the vessel will allow an inference to be made that the vessel is not engaged in subsistence fishing regardless of its distance from shore. The case of the *Paquete Habana* has blurred the legal distinction between coastal vessels

²⁶⁷ U.N. Doc. S/RES/661 (1990).

(up to 80 tons in that case) and high seas fisheries.²⁶⁸ Nevertheless, the notion that coastal fishing is synonymous with subsistence fishing, will mean that only the smallest of fishing boats will be entitled to the exception.

In assessing whether the coastal fishing vessel exemption has reached the status of a *jus cogens* norm we must ask whether the underlying rationale for the rule would support this conclusion. First, the capture or targeting of fishing vessels which constitute civilian objects is not permitted, absent a departure from strict civilian status by participation in military activities.²⁶⁹ Therefore a derogation from the rule exempting these vessels from capture/targeting is permitted. Such being the case, it is unlikely the norm is *jus cogens*. Although some international agreements prohibit the intentional attempt to starve the civilian population, the state practice of interdicting shipments of food may weaken the humanitarian goals underlying the norm. The goal of cutting off war-sustaining supplies which may be used by military forces is driven by the military necessity of destroying the opposing belligerence's ability to wage war. Taking the above factors into consideration, it is improbable that a persuasive argument could be made that the coastal fishing vessel exemption has or will ever reach *jus cogens* status.

In conclusion, we have seen the rule exempting small coastal fishing vessels move from a prohibition on direct participation in military operations, such as spying or being armed, to a rule that also prohibits indirect support such as the providing of food to the enemy from fishing. Finally, the exemption from capture or targeting can be further limited by the requirement of a military unit to exercise the right of self-defense, in which case the vessel will not only lose its exemption from targeting but also relieves the military unit of the obligation of complying with the London Protocol, if the threat so warrants it.

²⁶⁸ Recall that the Germans sunk numerous vessels smaller than the *Paquete Habana*, and the British argued that the 1400 ton fishing trawler *Narwhal* was a deep-sea fishing vessel not entitled to the Hague XI exemption, provided it wasn't engaged in a military activity already.

²⁶⁹ Hague XIII, and Protocol I.

RULES OF ENGAGEMENT AND THE CONCEPT OF UNIT SELF DEFENSE

Lieutenant Commander Dale Stephens ¹

INTRODUCTION

Rules of Engagement (ROE) have come into their own as an indispensable tool for the application of force in accordance with national and international priorities. ROE exist to direct *when* and *how* military force is to be applied.² Given this significance, almost all ROE that are authorized for a particular mission are reviewed by the national command authority in accordance with exacting politico-legal imperatives.³ At the strategic level, the rules which allow for the application of force will generally be authorized pursuant to the national right of self defense as it applies under the United Nations Charter (the UN Charter) and in accordance with supporting customary international law.⁴

The right of unit self defense, applies quite independently of this process of determining applicable ROE. In essence, the right of unit self defense allows a commander, or an individual soldier, sailor or airman the automatic authority to defend his or her unit, or him or herself, in certain well defined circumstances. While the right of unit self defense is fundamental to all international military legal codes, there has been little

¹ Lieutenant Commander Dale Stephens, Royal Australian Navy, serves as Command Legal Officer, Naval Training Command, Melbourne, Victoria, Australia. His previous assignments include Deputy Fleet Legal Officer, Maritime Headquarters and Legal Officer, Directorate of Operational and International Law. LCDR Stephens is a graduate of Cambridge University's International Law reading program and holds a Bachelor of Arts, Bachelor of Laws (Honors), and a Graduate Diploma of Legal Practice. The author wishes to acknowledge the invaluable assistance of LCDR J. Nelson, JAGC, U.S. Navy and Squadron Leader J. Hugoe-Matthews, RAAF in drafting this article.

² F. M. Lorenz, *Standing Rules of Engagement: Rules to Live By*, MARINE CORPS GAZETTE, Feb. 1996, at 20. The United States definition of ROE is contained in the NWP 1-14M which states that ROE "delineate the circumstances and limitations under which U.S. naval, ground and air forces will initiate and/or continue the combat engagement with other forces encountered." NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, Preface 2 (1995) [hereinafter NWP 1-14M]. The Australian definition of ROE, however, is a little wider and allows for the regulation of any application of force.

³ A. Roach, *Rules of Engagement*, 34 NAVAL WAR C. REV. 46, 47-48 (1983).

⁴ The right of national self defense derives principally from Article 51 of the United Nations Charter which states

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way effect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

sustained assessment of its legal basis. This lack of clear exposition is of critical concern, given the lethal discretion afforded to commanders under the right of unit self defense and the grave consequences which can befall the 'national interest' from a misapplication of force by a well meaning but poorly advised commander.⁵

This article describes the nature of unit self defense and considers the jurisprudential authority that underlies its current status. It argues that, as a result of what States say and do, the concept of unit self defense exists as a positive right under customary international law. It contends that while the concept of unit self defense has been enunciated as a positive right, the jurisprudential authority that underpins its legitimacy is grounded within the familiar '*Caroline*' principles.⁶ The constraints on self defense contained within the '*Caroline*' principles shape the contemporary application of the right. Hence, while the right of unit self defense is a right of customary international law, its parameters cannot exceed the prescription '*Caroline*' principles provide, otherwise the action ceases to be self defense.

The second part of the article examines the impact of Article 51 of the UN Charter on the concept of unit self defense. Article 51 preserves a State's right to defend itself in the face of an armed attack. It has been viewed by some as constituting the only basis for self defensive actions in all their variants.⁷ This view, when linked to the literal interpretation of the UN Charter espoused by certain theorists⁸ and the opinion expressed by the International Court of Justice (ICJ) in the *Nicaragua* case,⁹ arguably reduces the concept of unit self defense to a nullity. This article strongly contends that the use of Article 51 to restrict the scope of unit self defense is erroneous.

The third part of this article examines the scope of application of the right of unit self defense referring particularly to the United States Joint Chiefs of Staff Standing Rules of Engagement (JCS SROE).¹⁰ The JCS SROE constitute a public statement of legal theory which supports the United States (U.S.) interpretations of matters pertaining to the use of force. The JCS SROE grant the right of unit self defense a particularly wide ambit. This article contends that this expansive reach is not justified under international law. However, this article also contends that the 'obligatory'

⁵ By way of anecdotal evidence, as a legal advisor during joint exercises, I have witnessed very experienced operators request permission to return incoming fire to their aircraft (which is not necessary to request) and have seen the right of unit self defense stretched by operators to allow strategic air assaults in the absence of specific authorizing ROE.

⁶ R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AM.J.INT'L. L. 82 (1938).

⁷ I. BROWNIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, 280 (1963).

⁸ *Id.* and also see generally L. HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (2d ed. 1979).

⁹ Military and Paramilitary Activities in and Against Nicaragua, Merits, (Nicar.v. U.S.), 1986 I.C.J. 14 [hereinafter *Nicaragua*].

¹⁰ CHAIRMAN, OF THE JOINT CHIEFS OF STAFF INSTR 3121.01, Annex A4-3 (1 October 1994) [hereinafter CJCS INST. 3121.01].

nature of the right, as described in the JCS SROE, is entirely supportable under customary international law. This interpretation permits the conclusion that the right of unit self defense is in the nature of a non-derogable human right and thus, is beyond the reach of government consent and control. Finally, the article explores the operational application of the concept of unit self defense with particular reference to the legal limitations on the right of unit self defense, the timing of a response, and the level of force which may be applied.

PART I: THE NATURE OF UNIT SELF DEFENSE AND ITS JURISPRUDENTIAL AUTHORITY

1. The Status Of The Right Of Unit Self Defense Under Customary International Law

Contemporary State practice gives credence to the existence of unit self defense as a positive right at customary international law. This right is one which has evolved from bitter experience. Its authority is not dependent upon Article 51 of the United Nations Charter but, rather, more general principles and as such it may be fairly regarded as a right *sui generis*.

The right of unit self defense was particularly in issue during events which occurred in the Middle East during the 1980s and was expressly endorsed by the United States in both international and domestic forums without significant objection from other nations. Recent history highlights the public endorsement of this legal right by the United States.

a. 1983 Beirut Bombing of Marine Headquarters

In 1982, U.S. military forces were deployed to Lebanon as part of a multinational force comprising, U.S., French, Italian and British forces. The mission of the U.S. contingent was to facilitate the withdrawal of foreign military forces from Lebanon. Hence, the mission was in the nature of a Peacekeeping Operation (PKO). Through the course of the early part of 1983 relations had deteriorated between the local populace and the multinational force. On 23 October 1983, a suicide terrorist drove a truck containing a load of explosives into the center of the compound of the U.S. contingent of the multi-lateral force located at the Beirut International Airport. The explosion which followed killed 241 Marines. In its review of the matter, the Department of Defense Commission confirmed and endorsed the existence of the right of unit self defense when U.S. forces were confronted by a 'hostile act' or 'hostile threat' the report noted that the means by which the right could be effected had been compromised in that instance.¹¹

b. 1987 Attack on USS STARK

¹¹ DEPARTMENT OF DEFENSE COMMISSION, REPORT ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ACT, October 23, 1983, at 45-47. The Report concluded that specific guidance for dealing with the terrorist act in question was not provided and that a "mindset" had developed which detracted from a readiness to respond to that attack.

On 17 May 1987, the frigate USS STARK, operating in the Arabian Gulf, in support of Operation Earnest Will was hit by two Exocet missiles fired by an F-1 Mirage aircraft of the Iraqi Air Force. As a result of the attack, 37 U.S. Navy enlisted men were killed or declared missing.

The investigation into the attack by the U.S. House of Representatives Committee on Armed Services, confirmed that the ROE that applied in that instance did validly acknowledge the right of unit self defense.¹² The Committee's report noted that the discretion to act in unit self defense remained with the STARK'S Commanding Officer and was predicated on criteria relating to the occurrence of an armed attack or the threat of such attack.¹³ The Report found that there was no legal impediment that prevented the Commanding Officer from responding in defense of his unit in those circumstances. The Report did, however, acknowledge the difficulty of discerning hostile intent in the political reality which existed at the time when Iraqi forces were regarded as 'less threatening' than those of Iran.¹⁴

c. 1988 VINCENNES shootdown

On 3 July 1988, the USS VINCENNES, operating in the Southern Arabian Gulf, mistakenly shot down a civilian airliner, Iran Air Flight 655, with the loss of approximately 290 lives. At the time of the shootdown, the Commanding Officer believed that his ship was about to be attacked by an Iranian Air Force F-14 Tomcat aircraft.

Following the shootdown, U.S. Vice-President Bush declared to the UN Security Council that the actions of the U.S. warship, while clearly regrettable, were defensible on the basis of unit self defense.¹⁵ Only an ex-gratia payment of compensation was offered to the victims' families. In his submission to the Appropriations Sub-Committee of the House of Representatives Committee on Armed Services, Professor Maier noted, that because the U.S. Commander's actions were based on unit self defense, the ship's activities, 'including the firing of the missile,' were not illegal under the circumstances.¹⁶ Indeed, the legal debate that did occur following this incident essentially related to the issue of civil liability of the United States government to pay compensation.¹⁷

d. International Conventions

¹² STAFF OF HOUSE COMM. ON THE ARMED SERVICES, 100TH CONG., 1ST SESS. REPORT ON THE STAFF INVESTIGATION INTO THE IRAQI ATTACK ON THE USS STARK 4 (1987). [hereinafter Comm. Rep. on USS Stark].

¹³ *Id.*

¹⁴ *Id.* at 6.

¹⁵ M. Leich, *Agora: The Downing of Iran Air Flight 655*, 83 AM.J. INT'L. L. 318, 320 (1989) (reproduced in part).

¹⁶ *Id.* at 327.

¹⁷ *Id.* at 338.

Because the right of unit self defense is principally a customary right attaching to indigenous military forces, the concept would not be expected to be reflected within international agreements.¹⁸ Nonetheless, the right of individual self defense (a subset of unit self defense) is expressly stated in Article 21 of the Convention on the Safety of United Nations and Associated Personnel.¹⁹ While this Convention has not yet entered force,²⁰ it is significant that some negotiators at the Conference resisted the inclusion of the provision on individual self defense on the basis that it was 'self-evident' that this right manifestly existed and its express inclusion within the Convention was considered redundant.²¹

e. Military Manuals

While State practice confirms the existence of the right of unit self defense, the detail which fleshes out the legal concept is principally found in military manuals, Exercise ROE and Standing ROE. These 'sources' provide insight into the nature of this customary right in the context of military operations, its content and its parameters. While the significance of Exercise ROE and Standing ROE are somewhat self-evident expressions of State *opinio juris*, some commentators have been cautious about according any status to the content of military manuals.²² Others have strongly advocated the recognition of the role that military manuals play in the modern development of international law.²³ On balance, State-endorsed military manuals do play at least an evidentiary role in confirming both the existence and detail of norms of customary law. Thus an assessment of the content of such documents is both warranted and valuable in the context of this article.

¹⁸ The right of unit self defense exists as a right of customary international law developed by State practice and *opinio juris* or the State's opinion of the law. As the right of unit self defense applies to protect individual members of the armed forces and is a non-revocable right, it is not something which would be expected to be contained within an agreement between two countries. Indeed, what would be expected is exactly what is found here, namely an acknowledgement that the right exists for members attached to a UN mission.

¹⁹ "Nothing in this Convention shall be construed so as to derogate from the right to act in self defense." Convention on the Safety of United Nations and Associated Personnel, *opened for signature*, December 15, 1994, 34 I.L.M. 492.

²⁰ The Convention will go into effect when upon receiving its 22nd ratification. At the time of writing there are 19 parties (43 signatories).

²¹ M. Bourlogannis-Vrailas, *The Convention on the Safety of United Nations and Associated Personnel*, 44 INT'L. Comp. L. Q. 560, 586 (1995); See also E. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM.J. INT'L. L. 621, 630 (1995).

²² D. Linan, *Iran Air Flight and Beyond : Free Passage, Mistaken Self-Defense, and State Responsibility*, 16 YALE J. INT'L.L., 245, 290 (1991).

²³ W. Reisman & W. Lietzan, *Moving International Law From Theory to Practice : The Role of Military Manuals in Effectuating the Law of Armed Conflict*, in 64 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES: THE LAW OF NAVAL OPERATIONS 1, 7 (H. Robertson ed., 1991).

2. The Elements of Unit Self Defense

The Commander's Handbook on the Law of Naval Operations (NWP 1-14M)²⁴ occupies a central position in international military legal literature and its content is therefore highly regarded. The NWP 1-14M states that the right of unit self defense is premised upon the twin principles of necessity and proportionality.²⁵ This statement necessarily reflects a universal understanding of the constituent elements of self defense at international law.²⁶ The NWP 1-14M states that necessity justifies the exercise of the right only in response to a 'hostile act' or demonstration of 'hostile intent.'²⁷ While there are some differences among the various sources, most definitions state that a 'hostile act' is manifested by an actual armed attack upon a unit or individual and that the indicia of 'hostile intent' are manifested by actions which are immediately preparatory to that armed attack.²⁸ Accordingly, the terms 'hostile act' and 'hostile intent' are shorthand descriptions of the prerequisite circumstances which will justify action in unit self defense. The principle of proportionality, on the other hand, requires the level of force employed be of reasonable intensity, duration and magnitude having regard to the necessity to decisively counter the 'hostile act' or 'hostile intent.'²⁹

a. The *Caroline* Principles: The Jurisprudential Basis for Unit Self Defense

The formula of necessity and proportionality defines the essential elements of unit self defense and also underpins the concept of self defense generally. This formula was first enunciated in the celebrated '*Caroline*' exchange in the nineteenth century. The '*Caroline*' case has a critical significance at international law, and it has been acknowledged as the 'locus classicus of the law of self defense.'³⁰

The facts of the '*Caroline*' case concern the actions, in 1837, of British forces and their attack in the United States upon an American steamboat, the *Caroline*, which resulted in the destruction of the vessel and the death of two U.S. nationals.

In 1837, Canadian rebels sought to establish Canadian rule in upper Canada by driving out the British forces. The rebel force led by William

²⁴ NWP 1-14M, *supra* note 2.

²⁵ *Id.* at 4-3.

²⁶ Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 20 ¶ 41 (July 8). [hereinafter *Nuclear Weapons*].

²⁷ NWP 1-14M, *supra* note 2 at 4-3.

²⁸ Roach, *supra* note 3 at 50.

²⁹ CJCS INST. 3121.01, *supra* note 10 at ¶ 5d.

³⁰ Jennings, *supra* note 6 at 92.

McKenzie sought to take the capital, Toronto, but were driven back by loyalist forces. The rebels retired to 'Navy Island' situated on the Canadian side of the Niagara Falls border with the U.S. The rebels began to regroup and amass for a further attack. They privately chartered an American vessel, the *Caroline*, to supply arms and personnel to the island. The British government sought American government assistance in stopping this supply but there was no formal intervention by the U.S. government. If anything, there was tacit support for the rebels.

On December 29, 1837, a British Naval Officer, Captain Andrew Drew undertook a nocturnal mission to 'Navy Island' to destroy the *Caroline*. Upon arrival at 'Navy Island' he observed that the vessel had left for New York, and so he proceeded across the border and forcibly seized the vessel, set it alight and lowered it into the Niagara River where it was destroyed by going over the Falls.

The '*Caroline*' principles were derived from an exchange of correspondence between the British and American authorities following the event.³¹ The exchange of views was initiated by the American Secretary of State, Mr. Forsyth, who wrote to the British Minister at Washington, D.C., Mr. Fox. The effective resolution of the matter was, however, ultimately determined by Lord Ashburton of Britain and U.S. Secretary of State, Mr. Daniel Webster.³²

The tone of the early American correspondence is characterized by the understandable indignation of the U.S. government over the British intervention within the land territory of the United States and the subsequent British actions within United States territory. By contrast, the British reaction was muted. In his leading article on this issue, the highly respected British author (and subsequent member of the International Court of Justice), Jennings, outlines the initial confidence enjoyed by the British government when justifying its actions on the basis of the law of nations.³³ The initial British view was premised upon three grounds, namely, the piratical character of the '*Caroline*'s' operations, the unwillingness or inability of the United States to enforce its neutrality and, finally, on the necessity for self defense and self-preservation.³⁴

Commentators have consistently acknowledged that the first ground, piracy, was not relevant to the issue.³⁵ There was never any question of high seas jurisdiction nor was there any evidence of private gain being sought by American individuals. Indeed, as the correspondence continued, the question of piracy was not subsequently pressed. In respect of the second ground, Jennings accurately notes that the failure to enforce U.S. law in favor of U.S. neutrality was not in itself a substantial issue,

³¹ BRITISH & FOREIGN STATE PAPERS, Vol. XXX 193 (1841-1842).

³² *Id.* at 201.

³³ Jennings, *supra* note 6.

³⁴ M.A. Rogoff, M. Collins Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. INT'L. L. J. 493, 497 (1990).

³⁵ Jennings, *supra* note 6 at 86.

but rather, was only relevant to the third ground: self defense.³⁶

The balance of the '*Caroline*' correspondence was exclusively concerned with the third justification, namely, 'self preservation or self defense.' Indeed, it is on the issue of self defense that the '*Caroline*' case has become so celebrated. While Mr. Fox and subsequently, Lord Ashburton, initially prefaced their communications in terms of either 'self preservation or self defense,' the Law Officer advice provided to the British officials at the time, was couched only in terms of 'self preservation.'³⁷ Jennings notes that references to self defense simply 'crept' into the correspondence.³⁸ The importance of this change in terminology should not be underestimated. The defenses of 'self preservation' and 'necessity,' which were acknowledged as viable grounds under nineteenth century international law, essentially allowed a considerable latitude to the State claiming such defenses. In fact Jennings has suggested that self-preservation provided a justification for a State to do 'anything' in the name of national sovereignty.³⁹

Once the notion of self defense had 'crept' into the communication, its significance was embraced by both sides and became the pivotal issue of the dispute. It is from this subsequent communication that the nascent elements of unit self defense can be identified. In his response of 24 April 1841, Mr. Webster accepted the existence of the right of 'self defense' which attached to 'nations as well as individuals.'⁴⁰ He subsequently enunciated the time honored test that required Britain demonstrate a:

necessity of self defense, instant, overwhelming, leaving no choice of means and no moment for deliberation. It will be for [Britain] to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self defense, must be limited by that necessity and kept clearly within it.⁴¹

³⁶ *Id.*

³⁷ C. PARRY, LAW OFFICER'S OPINIONS TO THE FOREIGN OFFICE 1793-1860, 26 (1970).

³⁸ Jennings, *supra* note 6 at 92.

³⁹ Jennings notes that self-preservation, unlike self defense which presupposes an attack, "has no such limitation, and, broadly applied, would serve to cloak with an appearance of legality almost any unwarranted act of violence on the part of a state." *Id.* at 91.

⁴⁰ BRITISH & FOREIGN STATE PAPERS, *supra* note 31 at 1133.

⁴¹ *Id.* at 1138.

The significance of the '*Caroline*' formulation cannot be overstated. As Jennings has recognized, this formulation and its acceptance by the British authorities turned the concept of self defense from a political excuse [into] a legal doctrine.⁴² Jennings celebrates the development of the legal doctrine with definitive criteria as a positivist victory which rescued the doctrine from 'naturalist notions of an absolute primordial right of self preservation.'⁴³

Jennings is undoubtedly correct in his emphasis on the advantage of a succinct statement of the principle of self defense. The '*Caroline*' correspondence indicates, however, that the authors themselves drew upon natural law concepts and combined them with municipal notions of self defense as then understood in Anglo-American criminal law.⁴⁴ In this regard, the authors were acknowledging the personal and instinctive nature of self defense. Lord Ashburton plainly stated in his response to Mr. Webster of 28 July 1842, that self defense "is the first law of our nature, and it must be recognized by every code which professes to regulate the conditions and relations of man."⁴⁵ Further, Lord Ashburton was plainly aware of the novel nature of the American proposition that international actions may be justified by a combination of the established principle of necessity and the national legal concept of self defense. Lord Ashburton specifically noted the "ingenious" suggestion by Mr. Webster that the legitimacy of British actions should be assessed by reference to this modified concept of self defense under international law.⁴⁶ Thus, the British suddenly found themselves defending their Captain's actions on the basis of a principle narrower than self-preservation. Further, Lord Ashburton accepted the challenge and consistently described his justification of British actions in terms analogous to personal self defense.⁴⁷

The British response was valiant in its attempt to rely upon the facts of the '*Caroline*' incident to justify their actions under the cover of self defense. In so doing, Britain rejected the vague and ambiguous notions of 'self preservation' which were recommended by the Law Officers.⁴⁸ Lord Ashburton's response indicates that he was well aware that the success of 'self defense' as a justification was viable only because of the fortuitous and critical timing of certain key events. Specifically, he referred to the gathering of the Canadian insurgents within the U.S. territory which represented "the important means and instrument by which numbers and arms were hourly increasing,"⁴⁹ to the lack of intervention by American

⁴² Jennings, *supra* note 6 at 82.

⁴³ *Id.* at 92.

⁴⁴ BRITISH & FOREIGN STATE PAPERS, *supra* note 31 at 196.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 197.

⁴⁸ PARRY, *supra* note 37.

⁴⁹ BRITISH & FOREIGN STATE PAPERS, *supra* note 31 at 197.

authorities, and also to the lack of any immediate expectation of relief. Furthermore, the British response refers to the "last minute" expectation of the vessel being within Canadian territory at the time of the operation and that at that very moment there was an acute need to enter the United States given the immediate prevailing circumstances.⁵⁰ Despite the spirited British argument, the justification of self defense was not ultimately accepted by the United States, though the matter was essentially resolved by an acceptance by the United States of an apology from Great Britain.⁵¹ Notwithstanding this outcome, the enduring legacy of the 'Caroline' exchange is the enunciation of principles which continue to influence the law relating to unit self defense to this day.

b. The Contemporary Nature of Unit Self Defense

The right of unit self defense exists as a matter of customary international law and it is the 'Caroline' principles which provide the legal basis for the contours of the right as it is currently understood. The right of unit self defense, as it currently exists, has three predominant characteristics.

First, the right of unit self defense, as presently evidenced by State practice, applies only to a State's military forces.⁵² Military forces are unquestionably instrumentalities of the State⁵³ and are necessarily exposed to hostile environments. Thus, the concept of unit self defense has necessarily grown to maturity in the bitter experience of military engagements.

Second, the right of unit self defense is a customary right which attaches to the unit as an organic whole. The limits of the concept will therefore depend on what comprises a 'unit.' Contemporary statements extend the definition of 'unit' to any person or platform of indigenous or friendly forces whose circumstances conform to the temporal constraints of the 'Caroline' prescription.⁵⁴ Thus a unit may be constituted by each ship and aircraft of a task force or by a group of individual soldiers acting together on a mission.

Third, while it is the primary responsibility of the Commanding Officer to defend his or her ship (or aircraft or troops) from attack or from threat of

⁵⁰ *Id.* at 198-199.

⁵¹ *Id.* at 201.

⁵² Bourlogannis-Vrailas, *supra* note 21 at 586, where the author notes the views expressed by participants to the conference that unit self-defense applied to a state's military forces in accordance with extant ROE.

⁵³ See G. Politakis, *From Action Stations to Action: US Naval Deployment, "Non-Belligerency" and "Defensive Reprisals" in the Final Year of the Iran-Iraq War*, 25 OCEAN DEV. & INT'L. L. 31, 45 (1994) for a useful discussion on the manifestation of State character for merchant ships where the differing views of A.V. Lowe and C. Greenwood are outlined.

⁵⁴ CJCS INST. 3121.01, *supra* at note 7 at ¶ 5a, outlines the Commander's responsibility to defend "that Commander's unit and other forces in the vicinity" (emphasis added) as coming within the definition of 'unit.'

imminent attack,⁵⁵ the '*Caroline*' prescription sets the temporal limits on when force may be applied in defense of the unit. Unit self defense is justified only in the most pressing of circumstances. Action in unit self defense is justified and defensible only where the "imminence of the attack is so clear and the danger so great that defensive action is absolutely necessary,"⁵⁶ *a fortiori*, when the attack is underway. This criterion is almost intuitive for those from common law backgrounds. The importance of this impulse for self-protection was particularly emphasized in the '*Caroline*' exchange and has been similarly acknowledged by contemporary academics.⁵⁷ It is these features which combined allow for the inescapable conclusion that the right of unit self defense is unique in its character.

PART II: THE CHARACTER OF UNIT SELF DEFENSE AND THE INTERFACE WITH ARTICLE 51

1. The Right of Unit Self Defense as it Differs from National Self Defense

The right of unit self defense is one which attaches to the military forces of a State. Consequently, unit self defense should be distinguished from the right to act in national self defense which is exercised by the State itself. The jurisprudential basis of national self defense is also quite distinct from that of unit self defense. The right of national self defense is derived from Article 51 of the UN Charter⁵⁸ and supporting customary international law. Article 51 is 'strategic' in its compass, and refers to the inherent right of a Member of the United Nations (*i.e.* a State) to individual or collective self defense in response to an 'armed attack' against the State. Isolated attacks upon warships or aircraft do not necessarily allow, under the banner of Article 51, for the initiation of armed conflict between States. Such attacks will, however, always justify actions in unit self defense and may even justify the more general 'necessary and proportionate' actions of national self defense under Article 51. This remains, however, a matter of discretion for that State.⁵⁹ For example, the defense of civilian nationals is a function of national self defense, not unit self defense. Many political, legal, operational and diplomatic issues are relevant to the question of defending civilian nationals in any particular contexts. Therefore, only the national government can determine the circumstances in which such individuals will be offered military protection in accordance with issued ROE. The government may determine that the defense of civilians will be in

⁵⁵ FOGARTY, FORMAL INVESTIGATION INTO THE CIRCUMSTANCES SURROUNDING THE DOWNING OF A COMMERCIAL AIRLINER BY THE USS VINCENNES (CG 49) ON 3 JULY 1988, 13, ¶ 3(a)(2).

⁵⁶ Rogoff, *supra* note 34 at 506.

⁵⁷ P. Ingram, *Self Defense as a Justification for War*, VII2 CAN. J. L. & JURIS. 283, 287 (1994).

⁵⁸ U.N. CHARTER art. 51, *supra* note 4.

⁵⁹ Y. DINSTEIN, WAR, AGGRESSION AND SELF DEFENSE (2d ed.) 178-179 (1994).

accordance with the 'Caroline' principles (thus consistent with the criteria for unit self defense) though this cannot be presumed in every case.

While a national response is subject to national discretion, an attack on a warship or an aircraft automatically gives rise to a right by the local commander to respond in self defense of his or her unit. This right to respond in unit self defense applies whether or not there is a state of armed conflict and irrespective of the unit's geographical location.⁶⁰

a. The Right of Unit Self Defense - A Right *Sui Generis*

Part I of this article asserts that the right of unit self defense is a right *sui generis* which exists independently under customary international law. Unit self defense is characterized by its personal focus and has its origin "directly and chiefly, in the fact that nature commits to each his own protection."⁶¹ It is this focus which gives the right of unit self defense its prime characteristic: that of a non-derogable human right. Accordingly, it is not a right which is dependent upon a 'proper' interpretation of Article 51, nor is it one that derives from the *jus in bello*, or belligerent customary rights which are dependent upon a state of armed conflict. It is a legal right which stands alone and possesses its own indigenous authority.

With this heritage, the right of unit self defense stands apart from rights enjoyed under national self defense. Notwithstanding this inexorable conclusion, there persists a residual academic view that Article 51 has assimilated all exceptions to the prohibition on the use of force.⁶² Significantly, however, even the adherents of this 'literalist' view recognize the existence of an independent right for military forces to defend themselves. Thus, Brownlie, who has traditionally advocated a narrow interpretation of the application of Article 51, is able to state without qualification that "vessels on the open sea may use force proportionate to the threat offered to repel attack by other vessels, or by aircraft."⁶³ Brownlie bases this proposition, not upon Article 51, but rather, on 'general principles.'⁶⁴ His reference to the 'open seas' rights of vessels is, however, too restrictive. The authorities, which he cites in support of the proposition do not seem to limit the right in this way and have, been countered by other assessments.⁶⁵

⁶⁰ *Id.* at 195.

⁶¹ H. Grotius, *De Jure Belli Al Pacis*, in O. Schachter, *Self Defense and the Rules of Law*, 83 AM.J. INT'L. L. 259 (1989).

⁶² See generally BROWNIE *supra* note 7 and HENKIN *supra* note 8.

⁶³ BROWNIE at 305.

⁶⁴ *Id.*

⁶⁵ R. J. Grunawalt, *USS Vincennes and the Shootdown of the Iranian Airbus Flt 655*, NAVAL WAR COLLEGE MEMORANDUM, 1992 at 7; DINSTEIN *supra* note 59 at 195.

Moreover, contemporary practice extends the right of unit self defense beyond the 'high seas' (international waters) limitation and acknowledges that the right may be invoked by any military force whenever and wherever circumstances require. Justification for acting in unit self defense is not founded upon Article 51, but rather, is commonly stated to be in accordance with "general common law principles."⁶⁶ Certainly there is support for this contention in the 'Caroline' exchange itself, with references in the correspondence to the "law of nature."⁶⁷

b. Unit Self Defense and the *Nicaragua* case

It is particularly important to maintain the distinct legal authority for unit self defense in view of the opinion of the ICJ in the 1986 case concerning *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua* case).⁶⁸ In that case, the ICJ, for the first time squarely assessed the scope and ambit of the principle of self defense pursuant to customary international law. The case involved consideration of actions undertaken by the United States in providing assistance to rebel *contra* forces dedicated to the overthrow of the Nicaraguan government.⁶⁹ Conversely, the Court considered the actions of the Nicaraguan government with respect to military actions within Honduran and Costa Rican territory. The Court, relying on the very words contained within Article 51, held that resort to force in self defense could only be justified in circumstances of an 'armed attack.' Surprisingly, the Court went further and stated that action in self defense was warranted in response to attacks of certain "scale and effects" only.⁷⁰ Applying this innovative interpretation of self defense, the Court held that attacks which were of a lesser scale and effect were merely "frontier incidents" and therefore could not justify action in self defense.⁷¹ While the Court did anticipate the application of 'proportionate counter measures' by States in response to such lesser offenses ('frontier incidents'), the Bench did not expressly state that such countermeasures could themselves include the use of armed force. The better view is that permission to use armed force in such circumstances is implicit in the judgement,⁷² though this remains a matter of contention.

⁶⁶ A. Bergin, *Legal Aspects of the Employment of the Australian Defense Force*, in SECURITY AND DEFENSE 274 (D. Ball & C. Downes 1990).

⁶⁷ BRITISH AND FOREIGN STATE PAPERS, *supra* note 31, at 196.

⁶⁸ *Nicaragua*, *supra* note 9.

⁶⁹ *Id.* The Nicaraguan government claimed in its Suit against the United States that the U.S. government was effectively in control of *contra* forces including devising strategy, directing tactics, and that the purpose was to overthrow the Nicaraguan government in place at that time. *Id.* at 21 ¶ 20.

⁷⁰ *Id.* at 103 ¶ 195.

⁷¹ *Id.*

⁷² J. Hargrove, *The Nicaragua Judgement and the Future of the Law of Force and Self Defense*, 81 AM. J. INT'L. L. 135, 138 (1987).

The problem with this decision is the fact that the Court seems not to have recognized that unit self defense is a concept of tactical, rather than strategic or national, significance. Consequently, as a matter of operational reality, unit self defense will generally be required in the context of a "frontier incident," the very circumstance in which the Court has proscribed the use of 'self defense.' This problem is compounded by the fact that the Court also gratuitously indicated that 'collective' proportionate countermeasures (unlike collective self defense) were prohibited under customary international law.⁷³ Such a proposition would, it seem, prohibit Royal Australian Naval warships or indeed the military assets of any other ally, from coming to the aid of a United States Navy warship under attack from a particular threat (i.e. gunboat or aircraft), even if both ships were engaged in combined operations.

While *Nicaragua* should not be ignored, its value as the sole legal authority under which to assess all rights to employ force is extremely problematic. The Court's method and conclusions have been stringently criticized by prominent international academics⁷⁴, and the value of the decision as a prescriptive statement on the use of force is in some doubt. First, the case was principally concerned with the question of national self defense and accordingly, it does not provide a useful or reliable means of assessing the right of unit self defense. Second, from a procedural perspective, the authority of the findings on the merits in *Nicaragua* is questionable. The Court proceeded to the merits stage of the case relying upon preliminary arguments raised by the United States at the jurisdictional phase.⁷⁵ Accordingly, the arguments presented by Nicaragua were not subject to the rigorous testing which is usual in such forums. It is little wonder that the Court's reasoning is tendentious and somewhat narrow in aspects. Third, Article 59 of the Statute of the ICJ⁷⁶ makes plain that the decision of the Court has no binding force except between the parties to the particular dispute and in respect of that particular case.⁷⁷

Notwithstanding the prescriptive nature of the ICJ's judgement, it is also well recognized that inconsistent State behavior can thwart the development of nascent rules of customary law, whether stated within an ICJ judgement or otherwise.⁷⁸ Indeed, as a matter of practice, Australian and U.S. forces

⁷³ *Nicaragua*, *supra* note 9 at 110 ¶ 211.

⁷⁴ See H. Charlesworth, *Customary International Law and the Nicaragua Case*, 11 AM. Y.B. INT'L. L. 1, (1991); R. Turner, *Peace and the World Court: A Comment on the Paramilitary Activities Case*, 20 VAND. J. TRANSNAT'L. L. 53 (1987); D. Greig, *Nicaragua and the United States: Confrontation over the Jurisdiction of International Court*, BRIT. Y.B. INT'L. L. (1991).

⁷⁵ For general assessment of this point see E. Modabber, *Collective Self Defense: Nicaragua v. United States*, 10 LOY. L.A. INT'L. & COMP.L. J. 449, 465 (1988).

⁷⁶ Statute of the I.C.J. art. 59 states, "The decision of the Court has no binding force except between the parties and in respect of that particular case."

⁷⁷ Note also that UN CHARTER art. 94 states that, "each Member undertakes to comply with the decision of the I.C.J. in any case to which it is a party." The implication of this provision clearly suggests that members not a party to a decision are not so bound.

⁷⁸ D. GREIG, *INTERNATIONAL LAW*, 28 (2d ed. 1976).

regularly engage in combined force exercises in which the right of unit self defense is employed in favor of each other's warships, aircraft and land forces. In practice, the 'frontier incidents' classification espoused by the Court in *Nicaragua* is not recognized in the conduct of such bilateral or other multi-lateral exercises. Additionally, it should be noted that the ICJ itself, in the earlier *Corfu Channel* case, expressly anticipated that a ships' company could legitimately be closed-up in defense stations ready to respond if "fired upon"⁷⁹ in circumstances which undoubtedly approximated a "frontier incident."⁸⁰ The Court, in that instance, did not read any additional limitation into this accepted right and certainly did not indicate that this right to respond was somehow lost if it involved the defense of another State's warship.

In summary, it is fallacious to seek to limit unit self defense by reference to the Article 51 framework. Given the content of the majority opinion in *Nicaragua*, such an interpretation would eviscerate the application of the right of unit self defense and lead to intuitively absurd results. Rather, the better view is that the right of unit self defense exists independently as a matter of customary international law and draws its jurisprudential authority directly from the '*Caroline*' prescription.

PART III: THE SCOPE OF UNIT SELF DEFENSE

With its unique legal heritage, the right of unit self defense is a particularly constrained right. To date, most international recitations of the right are broadly similar in content because of the emphasis upon the 'necessity' criteria as understood under international law and also on national notions of self defense enunciated in the '*Caroline*' exchange. Recently, however, there has developed a divergence of interpretation as to the scope of the right. The recent JCS SROE definitions of 'hostile act' and 'hostile intent' are examples of an attempt to develop an expansive interpretation of the scope of unit self defense.

The JCS SROE, promulgated in October 1994, rationalizes the U.S. approach to many issues concerning the use of force⁸¹ and provides significantly greater guidance on a number of legal issues. This article contends that the position taken on unit self defense by the JCS SROE is not supportable for a number of reasons. While U.S. doctrine may unilaterally support an extension of the definition of 'hostile act' and therefore the scope for the application of the unit self defense concept, such an extension is not established within contemporary customary international law. Moreover, the extension exceeds the bounds of what is classically understood to be 'self defense' within the theoretical framework determined by the International Law Commission (ILC)⁸² and, more importantly, runs the risk of compromising the integrity of the general concept of unit self defense.

⁷⁹ *Corfu Channel (Merits)*, 1949 I.C.J. 4, 31.

⁸⁰ A "frontier incident" as canvassed in the *Nicaragua* case was one which had a lesser degree of gravity, one that was based upon 'scale and effects,' *supra* note 9 at 103 ¶ 195.

⁸¹ Lorenz, *supra* note 2 at 20.

1. The U.S. JCS Standing ROE

The JCS SROE, found at Chairman, Joint Chiefs of Staff Instruction 3121.01, state at paragraph 5a that:

A commander has the authority and obligation to use all necessary means available and to take all appropriate action to defend that commander's unit and other US forces in the vicinity from a hostile act or demonstrated hostile intent.

The general formula used in paragraph 5a is then paraphrased in subparagraph 5c in the context of a specific definition of unit self defense itself; sub paragraph 5c provides:

Unit self defense is the act of defending a particular unit of US forces, including elements or personnel thereof, and other US forces in the vicinity, against a hostile act or hostile intent.

The 'triggering events', 'hostile act' and 'hostile intent' are defined in paragraphs 5e. and f. respectively, as follows:

Hostile Act. A hostile act is an attack or other use of force by a foreign force or terrorist unit (organization or individual) against the United States, US forces ... **It is also force used directly to preclude or impede the mission and/or duties of US forces...** (Emphasis added.)

Hostile Intent. Hostile Intent is the threat of imminent use of force by a foreign force or terrorist unit (organization or individual) against the United States, [and] US forces....

⁸² The International Law Commission is a body of the United Nations created pursuant to its Statute of 21 November 1947.

a. U.S. JCS ROE and the 'Caroline' Principles

While the discretion afforded to commanders under unit self defense (and indeed individual soldiers, sailors and airmen) is unfettered, its application is dependent upon a highly specific set of circumstances. In this regard, the definition of 'hostile act' and 'hostile intent' as contained in paragraph 5e. and f. of the JCS SROE are cause for concern.

The JCS SROE set up additional grounds on which action in unit self defense may be taken. Specifically, unit self defense may be taken in response to the use of force which 'precludes or impedes a mission and/or duties of U.S. personnel.' These additional threshold factors exceed those which are properly contemplated under international law, that is, armed attack or threat of armed attack. This expansive scope is not presently supportable. In particular, the current U.S. definition is more akin to the concept of 'necessity' or 'self preservation'⁸³ which, ironically, was not accepted by Mr. Daniel Webster in the course of the 'Caroline' exchange. After British acceptance of self defense as the applicable legal formula in the 'Caroline' exchange the concept of self-preservation was relied on less and less through the latter half of the nineteenth century. These concepts of necessity and self-preservation permit a State to undertake actions in apparent violation of another State's rights to safeguard an essential State interest. The discretion to act in such a manner is, by definition, vested in the national government and will be exercised by that government in appropriate circumstances.

This is quite distinct from the requirements of unit self defense as defined by the 'Caroline' principles. Unit self defense emphasizes the existence of an "instant, overwhelming [need], leaving no choice of means and no moment for deliberation."⁸⁴ While a national command authority may delegate such 'national' powers, it is an overextension of the scope of 'hostile act/intent' to include notions of self-preservation within the unit self defense framework. By contrast, the constraints on unit self defense as recognized within the 'Caroline' principles, provide a reliable framework for the use of force in self defense in tactical situations. The appeal of the 'Caroline' formulation is its reliance on the natural impulse for self-protection which forms the basis of a universally recognized right at both international and national law. Furthermore, the act of self defense must take the form of a 'spontaneous reaction' to a hostile act or hostile intent. 'Self defense' is, at its very essence, reactive in nature. It's reactive nature is particularly emphasized by academics such as Dinstein who has fashioned the term "interceptive self defense"⁸⁵ to better describe the limits of the right.

⁸³ J. Raby, "The State of Necessity and the Use of Force to Protect Nationals," 1988 CAN. Y.B. INT'L. L. 253, 258.

⁸⁴ BRITISH & FOREIGN STATE PAPERS, *supra* note 31 at 1138.

⁸⁵ DINSTEIN, *supra* note 59 at 190. Dinstein's description of unit self defense as reactive in nature is entirely appropriate. His contention, however, that the right derives from Article 51 of the UN Charter is in error.

In contrast, the current JCS SROE formulation may easily be interpreted in a pre-emptive and aggressive fashion. One could imagine circumstances where a State has legitimately 'closed' its territorial sea, and has legitimately 'enforced' this closure with the presence of naval aircraft and military aircraft. A U.S. naval task force may well be 'impeded' in the accomplishment of its mission. In these circumstances, the use of force by the U.S. commander to 'reopen' the territorial sea could not possibly be justified on the basis of unit self defense.

b. The International Law Commission and Its Analysis of Self Defense

The current JCS SROE definition of unit self defense is also broader than that espoused by the United Nation's authoritative International Law Commission (ILC). In its deliberations on the codification of the Law relating to State Responsibility, the ILC commented on the constituent elements of self defense.⁸⁶ The Commission principally concluded that the right of self defense may only be exercised when there was a violation of a previous legal duty owed to the State (or by analogy - a person), which is of a specific type, namely armed aggression and the use of force in an attack.⁸⁷ In the absence of this prerequisite "international offense"⁸⁸ to which counter-force is necessary for immediate protection, the doctrine of self defense can have no application. Clearly, an armed attack or threat of an armed attack on a military unit or individual member necessarily constitutes the relevant violation which permits the use of force in self defense. Anything outside of actual armed attack (or threat of armed attack) cannot justify actions in unit self defense and therefore cannot provide a basis for actions undertaken outside this framework as is presently anticipated by the wording of the JCS SROE.

2. The 'Obligation' to Act in Unit Self Defense

In contrast to the questionable definition of what is constituted by a 'hostile act' or 'hostile intent,' the JCS SROE expressly state that unit self defense is both a 'right' and an 'obligation' incumbent on the unit commander.⁸⁹ Notwithstanding the possible inconsistency of these terms, the emphasis on the compelling nature of the right is supportable under customary international law. The paragraphs following inquire further into the jurisprudential basis of the 'obligatory' nature of unit self defense and conclude that the right of unit self defense is in the nature of a human right.⁹⁰ Self defense as a human right has been indirectly recognized by the ICJ. In particular, the ICJ has recognized that the law of armed conflict is

⁸⁶ 1980 Y.B. INT'L. L. Comm. Vol II, Pt. 1. Documents of the Thirty-Second Session.

⁸⁷ *Id.* at 15 ¶ 4.

⁸⁸ *Id.*

⁸⁹ CJCS INST. 3121.01, *supra* note 10 at A6 ¶ 7c.

⁹⁰ Nuclear Weapons, *supra* note 26 at 16 ¶ 25. The 'obligatory' nature of the right as outlined by the JCS SROE derives from the nonderogable reservation of Article 4 of the International Covenant of Civil and Political Rights.

an extension of human rights law.⁹¹ Consequently, governments owe their military members obligations with regard to certain human rights both in times of armed conflict and, of course, at other times. The right of unit self defense is an example *par excellence* of this obligation.

a. Unit Self Defense - A Human Right

The lethal discretion afforded to the contemporary commander under the authority of unit self defense is characterized in Australian interpretations as a 'non derogable right.'⁹² As indicated above, U.S. statements go further and maintain that unit self defense imposes an incumbent 'obligation' on the commander to act in defense of the unit. Nonetheless, the mandatory language used in both propositions demonstrates the fundamental humanitarian basis of this right.

Since unit self defense has the quality of a non-derogable human right, it, as such, adheres to the individual and is not amenable to State control. This conclusion is supported by the recent ICJ majority Advisory Opinion in the *Nuclear Weapons* case.⁹³ This matter concerned a request by the General Assembly of the United Nations for an advisory opinion by the Court pursuant to Article 96, paragraph 1 of the UN Charter as to the following question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" The majority Opinion of the Court determined that human rights law, and in particular, 'the right to life,' as reflected under Article 6(1) of the International Covenant of Civil and Political Rights (ICCPR),⁹⁴ continued to apply in times of armed conflict although it is subject to specific rules contained within the law of armed conflict.⁹⁵ In essence, the Court determined that the use of nuclear weapons was "scarcely reconcilable" with respect for humanitarian principles which has the foundation for the law of armed conflict.⁹⁶ While the focus of the Court in *Nuclear Weapons* was on the law of armed conflict, the decision does have application to the right of unit self defense as it applies to the military unit at all times.

In finding that the ICCPR had an extended reach even in times of armed conflict, the Court held that:

The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by

⁹¹ *Id.*

⁹² Australian Defense Force Pub. 3 (1st ed.) [hereinafter ADFP3].

⁹³ Nuclear Weapons, *supra* note 26.

⁹⁴ 999 U.N.T.S. 171, 6 I.L.M. 368 (1967). The Court also found this principle was reflected in other "regional Instruments for the protection of human rights." *Id.* at ¶ 24 [hereinafter ICCPR].

⁹⁵ *Id.* at ¶ 25.

⁹⁶ *Id.* at ¶ 95.

operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities.⁹⁷

b. Interface between Human Rights Law and the Law of Armed Conflict

The decision of the ICJ is of significance because it meshes human rights obligations within the framework of the law of armed conflict and could represent a fundamental shift in the interpretation of those *jus in bello* rules. This new interpretation has potentially major consequences for commanders at both the tactical and strategic level.

Throughout the judgement, the Court relied particularly on the principle of 'humanity.' This emphasis is important, given the invocation of this principle as a basis for both human rights law and humanitarian law. In *Nuclear Weapons*, the Court seemed to emphasize the issue of humanity as an overriding factor.⁹⁸ Such an interpretation is consistent with the Court's views in two previous cases. In 1949, *Corfu Channel*, the Court specifically noted the Convention Relative to the Laying of Automatic Submarine Contact Mines of 18 October 1907 (Hague Convention No. VIII) and found that it did not apply according to its terms in that instance.⁹⁹ Notwithstanding, the ICJ was prepared to find an obligation incumbent upon Albania to warn of the existence of naval mines within its territorial seas on the basis of "certain and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war."¹⁰⁰ Similarly, in *Nicaragua*, the ICJ once again determined that U.S. mining operations within Managua harbor violated the principles of 'humanity' which underpinned Hague Convention No. VIII.¹⁰¹ However the Court acknowledged that the Convention itself did not have a *de jure* application. Notwithstanding this emphasis on the principle of 'humanity,' the Court has, in all three cases, failed to properly investigate the content of these elementary considerations. This absence of an articulated analysis has made it difficult to ensure a meaningful application of the principles in practice.

The fusing of human rights law and humanitarian law has been a contentious topic at least since the end of the second world war.¹⁰² Thus, while recognizing the common political and philosophical idea of

⁹⁷ *Id.* at ¶ 25.

⁹⁸ *Nuclear Weapons*, *supra* note 26.

⁹⁹ *Corfu Channel*, *supra* note 79.

¹⁰⁰ *Id.* at 22.

¹⁰¹ *Nicaragua*, *supra* note 6 at 112 ¶ 215.

¹⁰² G. BEST, *WAR AND LAW SINCE 1945*, 72-79 (1994).

'humanity' which influenced both human rights law and the humanitarian aspects of the law of war, Draper has stringently criticized the attempt to fuse the two regimes of law into one central base. Draper noted that:

The attempt to confuse the two regimes of law is insupportable in theory and inadequate in practice. The two regimes are not only distinct but are diametrically opposed. At the end of the day, the law of human rights seeks to reflect the cohesion and harmony in human society and must, from the nature of things be a different and opposed law to that which seeks to regulate the conduct of hostile relationships between states or other organized armed groups, and in internal rebellions.¹⁰³

The logic of Draper's view is powerful. It is the law of armed conflict which is designed to mitigate, as far as possible, the 'evils of war.'¹⁰⁴ It is therefore difficult to support a conclusion that the core values of human rights law now create a human rights nexus between combatants engaged in military operations. It is likely that the Court did not intend this particular outcome. Instead, the decision characterized the relationship between the two bodies of law as one of intermeshing, in which the law of armed conflict would continue to have priority. Accordingly, when respect for the right to life can be promoted consistently with the objectives of military necessity, then the former must be supported. In short, the proportionality balance between military necessity and unnecessary suffering may well now be biased in favor of the core values of human rights law because of humanitarian considerations.

c. Human Rights and Unit Self Defense

Notwithstanding the prevailing academic debate on the *jus in bello*, it is the Court's decision in *Nuclear Weapons* that has reinforced the legal quality of the right of unit self defense. In times of armed conflict both conventional and customary international law apply to regulate the rights and obligations of persons involved. What is significant, however, is the application of the admittedly nebulous concept of the 'right to life' to military members both in times of armed conflict and, *a fortiori*, in situations other than armed conflict. This notion of a 'right to life' underpins, in part, a national government's legal relationship with its own military members.

The law of armed conflict is generally directed towards ensuring the protection of rights of foreign nationals (combatants and civilian) and its own civilian population. Under the law of armed conflict, a national government owes few obligations towards its own combatants. One of the

¹⁰³ G. Draper, *Humanitarian Law and Human Rights*, 1979 ACTA JURIDICA 193, 205.

¹⁰⁴ Convention Respecting War on Land, 1907 [hereinafter Hague Convention IV].

few express protections afforded to its military members is contained within Article 12 of Geneva Conventions I and II, which makes it clear that these Conventions apply to certain wounded, sick or shipwrecked persons generally without regard to nationality.¹⁰⁵ Accordingly, the clarification by the ICJ of the application of certain non-derogable human rights to military members generally in times of armed conflict has a significant effect. The Court's decision is likely to generate renewed consideration of the rights enjoyed by military members both in times of armed conflict and in times of peace. Significantly, the Court's interpretation accords with Draper's conceptual foundation by continuing to regulate the relationship between the national government and its own citizens who do not lose that status by reason of membership of the armed forces. Importantly, the Court was not advocating that the ICCPR applied *de jure*, but rather, was recognizing that the underlying principles of the ICCPR applied.¹⁰⁶ This decision is important because it accords the principle customary status. Thus the intermeshing of human rights and the law of armed conflict does give rise to incumbent obligations on national governments to respect certain inalienable rights possessed by its service members. The content of the Article 6 of the ICCPR provides that: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life...."¹⁰⁷

The right to life has been interpreted as being principally a safeguard against arbitrary killing.¹⁰⁸ This right is seen as protecting persons from certain deleterious consequences rather than engendering any kind of prospective entitlement. In its application to the concept of unit self defense, it is clear that the right to life attaches to each military member. In a disciplined military environment, the right to life ensures that governments cannot place their military forces in harms way and withhold from them the right to defend themselves. Moreover, it acts to ensure that justification can be made under international law for personal self defensive action wherever and whenever such action is necessary, irrespective of the application of Article 51¹⁰⁹ and irrespective of other issued ROE.

The positioning of this right to life in the context of human rights means that the term 'obligation' as used in the U.S. definition of unit self defense and the phrase 'non derogable' right employed in the Australian formulation are both consistent with the legal quality of the concept. A military member cannot lawfully be ordered to resist acting in individual or unit self defense, and a government cannot lawfully prevent a person or

¹⁰⁵ T. Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L. L. 595 (1983).

¹⁰⁶ ICCPR, *supra* note 94.

¹⁰⁷ *Id.*

¹⁰⁸ Y. Dinstein, *The Right to Life, Physical Integrity, and Liberty in THE INTERNATIONAL BILL OF RIGHTS*, 115 (L. Henkin ed., 1981).

¹⁰⁹ D. Fleck, *Rules of Engagement for Maritime Forces and the Limitations of the Use of Force under the UN Charter*, 31 GER. Y.B. INT'L. L. 165, 177 (1988).

unit from exercising such a right. In effect, the government cannot compel what is tantamount to suicide.

PART IV: OPERATIONAL APPLICATION OF UNIT SELF DEFENSE

Actions taken in unit self defense are always effected in the tactical environment. The '*Caroline*' principles arose out of a specific factual matrix characterized by the urgency of the situation. Thus, the terminology of the exchange referred to 'hourly developments' and 'last minute' actions. When acting on the basis of unit self defense, the commander's task is to discern the intention of the 'opposer' to establish whether actions being observed are about to be translated into a 'hostile act,' thus justifying the use of force to counter the threat. The assessment that an 'opposer' in fact threatens the imminent use of force is often a critical and time sensitive judgement. The decision, however, will be based upon a combination of generally objective factors relating to well established tactical indicia which discloses an intention to attack.

While the discretion to act in unit self defense remains, and indeed must remain, entirely that of the commander at the scene, objective indicia relevant to a determination of intention have been developed. Thus, an 'opposing' unit's maneuvering into a weapon launch profile, the presence of a third party to coordinate over-the-horizon targeting, the locking on of fire control radars, the opening of bomb bay doors, the acoustic detection of torpedo or missile tube doors, hostile electronic counter measures and the distance, speed and bearing of an opposing unit or force are criteria which may point to the existence of a hostile intent.¹¹⁰ In addition, information relating to the prevailing political circumstances must also be understood and factored into the command decision making process.

The concept of 'necessity' which underpins unit self defense is largely concerned with 'probability and risk.'¹¹¹ When a foreign force or unit is engaging in aggressive posturing, the observer must endeavor to commit the foreign force or unit to a disclosure of their intentions. Established international signals and maneuvers give the appropriate indication of concerns and allow for a graduated response. The objective of the foregoing process is to discern intention and to increasingly put the onus upon the other side to betray a hostile intention so that a response undertaken in unit self defense will be tactically sound and legally supportable.¹¹²

¹¹⁰ *Id.* at 181-182.

¹¹¹ M. WALZER, *JUST AND UNJUST WARS* 144 (2d ed., 1991).

¹¹² D. O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 55 (1975).

a. **The Timing of the Response**

The timing of the intended victim's response is critical to a later claim of unit self defense. A number of tests have been developed which seek to guide the commander in the exercise of discretion to initiate action in defense of the unit.

In his didactic analysis of the composite elements of self defense, Badr insisted upon a requirement of 'parallelism in kind and sequence'¹¹³ between a perpetrator's act and action undertaken in self defense. His analysis demands that a self defensive reaction is predicated on a 'priority in time' requirement and is permitted only from 'the start of an armed attack.'¹¹⁴ The requirement for an imminent 'armed attack' is strictly interpreted by Badr as applying only after an armed attack has commenced. Badr's view is an extremely conservative interpretation of the 'Caroline' principles and does not take into account developments in modern weaponry and the tactical realities of modern naval operations. This conundrum was recognized by Professor O'Connell, in the naval context, some 20 years ago when he stated:

Technology has made of this a potentially lethal game, for weapon systems are so instantly activated, and homing or guidance systems, are, in theory in at least, so accurate and their terminal impact is so destructive, and the design of warships affords so little possibility for damage control, that the victim may well be deprived of the capacity of self defense.¹¹⁵

A second test based on the criterion of the 'last irrevocable act' was developed by other authors in an attempt to reconcile the legal parameters with the capacity of modern weaponry.¹¹⁶ The test, while directed at the strategic level, has an obvious application at the tactical (unit self defense) level. The test proposed is cautious in application and seeks to discern an unambiguous 'intention' from the other side as to its commitment to initiate an attack. Thus, once it is confirmed that the aggressor has taken the "last irrevocable act on its side which is necessary for the commission of the offense of an armed attack"¹¹⁷ then self defensive reaction is permissible. This test may be criticized for imposing highly theoretical and arbitrary distinctions. For example, the reality of modern naval warfare, is such that there may well be no discernible "last irrevocable

¹¹³ G. Badr, *The Exculpatory Effect of Self Defense in State Responsibility*, 10 GA. J. INT'L. & COMP. L. 1, 21 (1980).

¹¹⁴ *Id.*

¹¹⁵ O'Connell, *supra* note 112 at 70.

¹¹⁶ N. SINGH & E. MCWHINNEY, *NUCLEAR WEAPONS AND CONTEMPORARY INTERNATIONAL LAW* 97 (1989).

¹¹⁷ *Id.* at 96.

act" before a weapon is launched.¹¹⁸ The problem is particularly acute with respect to attack by submarines because, invariably, there is little or no prior indication of a preparedness to launch an attack.

Given the difficulties with the previous two tests, it has been persuasively argued that the relevant test in the modern context is one of 'reasonableness.' The contemporary commander has an obligation to exercise 'due care' when assessing a potential threat, having regard to all relevant objective indicia. The commander is to take into account all information reasonably available at the relevant time, and when "satisfied that a threat is hostile, [the Commander] is not precluded from exercising [the] right of self defense."¹¹⁹

The modern commander does not have to sustain the first hit prior to acting in unit self defense. Moreover, not unlike State common law, a commander when faced with a threat, need not retreat. On the other hand, in such circumstances, there is no compulsion to use force where withdrawal may be the most effective method of defending the unit. Significantly, however, the urgent and immediate need to resort to self defense is still maintained and only action undertaken in such circumstances will be legitimized.

b. Level of Force

The 'Caroline' formulation of unit self defense includes a self limiting mechanism which allows nothing "unreasonable or excessive, since the act justified by the necessity of self defense, must be limited by that necessity, and kept clearly within it."¹²⁰ Accordingly, reprisal action is not consistent with unit self defense as this would not be strictly limited to the needs of defense or, in its timing, proportional to the threat.¹²¹ Even so, there is a case for more sustained action beyond the immediate scope of the attack where there is a reasonable expectation that the attacks will immediately continue. Such action continues to conform to legitimate self defense and is not a 'reprisal' or 'retribution' since its motive would be 'protective' and not 'punitive.'¹²²

CONCLUSION

It is a ubiquitous feature of military culture that the commander's first military responsibility is the protection of his or her troops. This central proposition has found legal expression in the concept of unit self defense. This concept has at its base a 'natural law' heritage, though it exists independently as a positively stated right of customary international law. The jurisprudential basis for interpreting the contours of this right come

¹¹⁸ M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 240 (1961).

¹¹⁹ W. Hays Parks, *Righting the Rules of Engagement*, *PROCEEDINGS/NAVAL REVIEW* 83, 93 (1989).

¹²⁰ *BRITISH & FOREIGN STATE PAPERS*, *supra* note 31 at 1138.

¹²¹ O. SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 154 (1991).

¹²² *Id.*

from the celebrated '*Caroline*' principles. It is these principles which dictate the very stringent temporal limits of necessity and proportionality for the exercise of the right. However, the right as established under international law draws heavily upon domestic common law conceptions of self-defense. This allows those commanders who share such a legal heritage an almost intuitive sense of understanding the type of actions rendered in unit self-defense which are acceptable.

While Article 51 of the UN Charter acknowledges the right of States to individual and collective self defense, it is critical that this authority be distinguished from the legal authority which provides the foundation for unit self defense. Unit self defense is, by its very personal nature, altogether different in legal quality to those rights enjoyed by the State. Indeed, unit self defense is in the nature of an individual, inalienable human right, which puts it beyond governmental control or consent. However, the scope of the right of self defense is necessarily constrained to apply in only the most pressing and urgent of situations. Those situations arise where a hostile act or intent is imminent or occurring. Any extension of this scope as expressed by the JCS SROE transcends the concept's jurisprudential and natural law bases. This expansion is of cause for concern because it provides a mechanism where a commander may consider him or herself entitled to act outside the 'necessity' requirements of unit self defense as understood at international law. This can only lead to potential confusion and hesitation on the part of a conscientious commander and can therefore lead to tragic loss of life in circumstances where such loss should have been avoided. It has been stated that the "efficacy of any system of laws rests upon its perceived - legitimacy by those whose conduct it is intended to regulate."¹²³ In this regard the universal acceptance of the right of a military unit to defend itself in circumstances of actual or imminent attack is ample endorsement of the intrinsic legitimacy of the right of unit self defense. Where actions go beyond the immediate need for a spontaneous reaction, however the legitimacy of such actions within the realm of unit self defense is, problematic. Such actions are authorized under the banner of national self defense which is subject to its own legal considerations.

In summary, the right and, indeed, obligation, of unit self defense is an independent legal concept which guarantees the safety of a State's military members. While it is absolute in its legal status, unit self defense is a particularly constrained right and must therefore be interpreted carefully and in accordance with traditional conceptions if its integrity is to be maintained and if commanders are to act responsibly.

¹²³ F. Russo, *TARGETING THEORY IN THE LAW OF NAVAL WARFARE*, 40 NAVAL L. REV. 1, 21 (1992).

LIFE AND HUMAN DIGNITY, THE BIRTHRIGHT OF ALL HUMAN BEINGS: An Analysis of the Iraqi Genocide of the Kurds and Effective Enforcement of Human Rights

Lieutenant Commander Catherine S. Knowles¹

I. INTRODUCTION

Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they *are* the world of the individual persons; the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.²

Modern human rights began in response to the horrors of Adolph Hitler's concentration camps which destroyed 6 million Jews. Human rights exist in the furor of a three-way civil war in Eastern Europe, where Bosnian Serbs tried to wipe out Croats and Muslims by genocide, torture, and the rape of women in order to gain a tactical military advantage. The rights exist in the heart of Africa as an emerging Hutu democracy tries to wrest itself free from the bonds of an elitist Tutsi minority, but does so by indiscriminately killing over 1 million of them and resorting to military extremism. Finally, they exist in the lands of ancient Mesopotamia, on the southern end of the Tigris and Euphrates Rivers, where rural Kurds, farmers and mountain dwellers, struggle for self-determination and day-to-day survival - a place where Saddam Hussein launched chemical weapons against his own people, murdering about 100,000 people.

In the human rights domain, the world community seems to have agreed

¹ Judge Advocate General's Corps, United States Navy. The positions and opinions stated in this article are those of the author and do not represent the views of the United States government, the Department of Defense, or the United States Navy. Lieutenant Commander Knowles is an active duty Naval Officer, presently serving as the Staff Judge Advocate to COMMANDER, CARRIER GROUP TWO, located in Norfolk, Virginia.

² JOSEPH P. LASH, *ELEANOR, THE YEARS ALONE*, 81 (1972), *citing* ELEANOR ROOSEVELT, *THE GREAT QUESTION* (United Nations 1958). Eleanor Roosevelt was the first United States delegate to the United Nations. While serving in that capacity she was elected chairman of the nuclear human rights commission. That commission drafted the Universal Declaration of Human Rights. *See* LASH, *Id.*, at 56 - 57.

to pursue violations to a greater degree in the past few decades than ever before in history.

We live in a world in which the yearning for human rights is a universal phenomenon. . . . Never before have so many people everywhere believed that they have human rights and that it is the purpose and obligation of governments to respect and to protect those rights. True, many people in different countries suffer today as much as others have at other times. What has changed though is that today the people believe that the government which subjects them to this suffering is depriving them of their internationally recognized rights and that, consequently, these governments are acting illegally. This perception, this perceived illegality, gradually robs the governments which violate human rights of the political legitimacy they need to govern.³

International law has expanded to protect and defend individual basic rights, not just the rights of nation-states. Human rights developed separate from rights granted by the state after World War II. The development of individual human rights would be even better characterized as a human rights evolution vice revolution, since it was not really a change but a beginning - the world began to recognize rights without regard to state sovereignty. It is in this context that atrocities in Bosnia, Rwanda, and Iraq occurred. The world will not sit idly by, nor should it, and allow states to violate these principles so hard fought to declare. The world has responded in Nuremberg, Bosnia, and Rwanda; now is the time to examine and pursue options with regard to Iraq. Iraq is bound by international law - treaties and custom - and the international community must act to enforce these obligations.

First, this article will describe the facts surrounding Iraq's human rights violations regarding the Kurds. The man sent by Saddam Hussein to quell the alleged Kurdish rebellion (which was the premise under which the genocide occurred) had such utter and complete disgust for them that when answering questions about "what to do with so many captured civilians? 'Am I supposed to keep them in good shape?' al-Majid asks. 'What am I supposed to do with them, these goats? . . . Take good care of them? No, I will bury them with bulldozers.' And that is what he did." It was called the Anfal Campaign.⁴

The second section is an analysis of the applicable law. Next, will be

³ Thomas Buergenthal, *The Human Rights Revolution*, 23 ST. MARY'S L.J. 3, 5 (1991).

⁴ MIDDLE EAST WATCH, *GENOCIDE IN IRAQ*, at 345 (1993). The surviving Kurds attempted another unsuccessful revolt in March 1991, hoping to take advantage of Iraq's weakness during the Gulf War. A year later, 14 tons of documents that had been seized during the revolt were shipped secretly to safety in the United States. The Senate Foreign Relations Committee safeguarded the documents and made them available for the Middle East Watch examination. It is upon this research and the interviews and physical examinations that followed over the next eighteen months that formed the basis for the information published in the *GENOCIDE IN IRAQ* analysis.

a comparison to the circumstances in Bosnia and Rwanda. Following that is the enforcement options available for the Kurds against the Iraqis. Finally, the article ends with a discussion of the effects of continued inaction.

II. PESHMERGA, THOSE WHO FACE DEATH - THE FACTS

A. Historical Context

The fate of the Iraqi Kurds and their losing battle for self-determination has its roots in a history that is centuries, if not millennia old.

Contemporary Iraq occupies the territory that historians traditionally have considered the site of the earliest civilizations of the ancient Near East. Geographically, modern Iraq corresponds to the Mesopotamia of the Old Testament and other, older Near Eastern texts. In Western mythology and religious tradition, the land of Mesopotamia in the ancient period was a land of lush vegetation, abundant wildlife, and copious if unpredictable water resources. As such, at a very early date it attracted people from neighboring, but less hospitable areas. By 6000 B.C., Mesopotamia had been settled, chiefly by migrants from the Turkish and Iranian highlands.⁵

The Kurds have lived in the northern mountainous region of Iraq and have dominated areas of the Middle East that also include southeastern Turkey and northwestern Iran. The Kurds have lived in this area for thousands of years. The region was designated "Kurdistan" in the 12th century and one of its villages, Jarmo, "is the most ancient village in the Middle East. Here, four thousand years before our era, man already cultivated diverse grains . . . plucked fruits . . . [and] raised sheep and goats."⁶

There is a distinct geographic separateness to Kurdistan because of its steep mountain borders. It has developed its own culture and even a unique Kurdish style dress; it sustains a healthy agricultural economy because it gets adequate rainfall (unlike most of Iraq), it has a favorable climate, and it has several tributaries of the Tigris River passing through the region; it sustains pastures for grazing livestock;⁷ and the Kurds have a separate language with Indo-European roots, not that of a Farsi, Persian or Turkish dialect.⁸ Their language was probably influenced by the Indo-European tribes that settled in the area back

⁵ See generally, GEORGE ROUX, ANCIENT IRAQ (1965) as the reference source for LIBRARY OF CONGRESS, AREA HANDBOOK SERIES, IRAQ at 12. <<http://lcweb2.loc.gov/frd/cs/iq0012.html>> .

⁶ MIDDLE EAST WATCH, GENOCIDE IN IRAQ, at 23 (1993), citing P. J. BRAIDWOOD, PREHISTORIC INVESTIGATION IN IRAQI KURDISTAN (1960).

⁷ CHRISTINE MOSS HELMS, IRAQ. EASTERN FLANK OF THE ARAB WORLD, at 12-15 (The Brookings Institute 1984).

⁸ LIBRARY OF CONGRESS, AREA HANDBOOK SERIES, IRAQ, "Geography and Population, Kurds," at 32. <<http://lcweb2.loc.gov/frd/cs/iq00032.html>> .

in 1600 B.C.⁹

Despite so many aspects of separateness and distinctness, the Kurds have never been politically independent in the modern era. From the 16th to the early 20th centuries, their territories formed part of the Ottoman and Persian Empires.¹⁰ With the exception of a grant of independence in the 1920's that never materialized because their territory was divided amongst five separate nations, and except for a year of independence in 1946 when the Kurds of Iraq and Iran formed their own republic, and except for a period of very brief regional autonomy granted by Saddam Hussein early in his reign, the Kurds have had no independence in the 20th century either. Prior to Anfal, the Kurds "were proportionally the largest ethnic minority in the region" and comprised about 20 to 25% of the "total Iraqi population."¹¹ In 1987, Iraq's total population was estimated at slightly more than 16 million¹² including more than 4 million Iraqi Kurds.¹³ By 1994, that estimate of Kurds was down to about 3.8 million.¹⁴ Iraq's total population was not available.

The Kurds have not acquiesced to domination quietly. All Kurdish factions revolted against various central governments in Turkey, Iran, and Iraq as those governments tried "assimilating the Kurdish minority. . . . Of these traditions of rebellion, none has been more persistent than that of the Iraqi Kurds. . . . Since the 1920's, the Iraqi Kurds have staged one revolt after another against the central authorities . . . [most of them led by] a charismatic tribal leader from [Barzan] Valley, Mullah Mustafa Barzani."¹⁵ It was against this backdrop that the Kurdish fighters, *peshmerga*, were born. The name means "those who face death," because since their inception, they were "hunted down relentlessly" and as a result, were only sporadically successful.¹⁶ It is these Kurdish fighters and their families that the Iraqi government targeted during the genocide campaign, known as Anfal.

The current Iraqi leader, Saddam Hussein, came to power as vice chairman of the Revolutionary Command Council [hereinafter RCC], when his political party, the Ba'ath Party, forcibly returned to power in 1968.¹⁷ The RCC was formed in 1968 and its chairman would be the "president of the republic. . . . [It] is the supreme organ of the state, charged with the mission of carrying out

⁹ *Id.*, "Historical Setting, Ancient Mesopotamia," at 12. <<http://lcweb2.loc.gov/frd/cs/iq0012.html>>.

¹⁰ GENOCIDE, *supra* note 3, at 24.

¹¹ *Id.*, at 24 - 26; *see also*, HELMS, *supra* note 6, at 7 - 37, especially at 22.

¹² LIBRARY OF CONGRESS, AREA HANDBOOK SERIES, IRAQ, Appendix A, at Table 2. <http://lcweb2.loc.gov/frd/cs/iraq/iq_appen.html>.

¹³ HELMS, *supra* note 6, at 21; *see also* GENOCIDE, *supra* note 3, at 24.

¹⁴ Brian Spooner, *Kurds*, (visited 4 Dec 1997) <<http://www.grolier.html>>.

¹⁵ GENOCIDE, *supra* note 3, at 24 - 25. *See also* MIDDLE EAST WATCH, HUMAN RIGHTS IN IRAQ, at 2 (1991).

¹⁶ *Id.*, at 25 - 26.

¹⁷ *Id.*, at 25, footnote 6. *See also* MIDDLE EAST WATCH, HUMAN RIGHTS IN IRAQ, at 4 (1991).

the popular will by removing from power the reactionary, the dictatorial, and the corrupt elements of society and by returning power to the people." It declares to have three separate branches, executive, legislative and judicial, however, in reality the executive branch is in complete control. In 1979, Saddam Hussein was elected President by the RCC, where he has remained in power ever since.¹⁸

One of Saddam Hussein's more honorable goals was to try to unite the Iraqi people as one people and one nation. Iraq had had its own history of invasion and dominance, especially from Turkey and Iran, and it was Saddam's desire (and that of the Ba'ath government) to maintain a separate state with its own national identity. He pursued this goal by expending significant financial resources searching for Iraq's cultural heritage in various archeological sites and by personal visits to the Kurdish region - a historic first for any Iraqi leader.¹⁹

He also recognized the important security consequences of ensuring a safe and loyal Kurdish population at his vulnerable borders and of course, preserving his power to exploit the huge oil reserves at the edges of the Kurdish region.²⁰ In fact, when Iraq was formed after World War I, the British specifically included the Kurdish region of Mosul within its borders so Iraq would have access to those oil resources.²¹ Hence, he was extremely upset when Barzani started yet another insurgency in the mid-1970's. Barzani had received some foreign support from the United States, Iran, and Israeli - all of whom supported weakening the government of Iraq.²² The "Barzani Revolution" failed and the reprisals to the Kurds were severe. "Those who have sold themselves to the foreigner will not escape punishment," said Saddam Hussein That attitude colored Baath Party dealings with the Kurds for the next two decades. Its culmination was the campaign known as Anfal.²³

The immediate effects of the Kurdish rebellion included: the involuntary relocation to the desert areas of southern Iraq of 50,000 to 200,000 Kurds; the destruction of hundreds of villages in a "border clearance" operation; a "redraw[ing] the map of Iraqi Kurdistan;" and the disappearance of 5000 to 8000 Barzani males presumed to have been the chief rebels.²⁴ "In a 1983 speech, President Saddam Hussein left little doubt what had happened to the Barzanis. 'They betrayed the country and they betrayed the covenant,' he said, 'and we

¹⁸ LIBRARY OF CONGRESS, AREA HANDBOOK SERIES, IRAQ, Government and Politics, The Revolutionary Command Council, at 71. <<http://lcweb2.loc.gov/frd/cs/iq0071.html>>.

¹⁹ HELMS, *supra* note 6, at 32 - 37.

²⁰ *Id.*, at 23 - 36; see also Figure 1, *supra*, at 5.

²¹ MIDDLE EAST WATCH, HUMAN RIGHTS IN IRAQ, at 1 (1991). [hereinafter HUMAN RIGHTS IN IRAQ]

²² GENOCIDE, *supra* note 3, at 34 - 41.

²³ *Id.*, at 35.

²⁴ *Id.*, at 36 - 41. The phenomenon of disappearances . . . consists essentially of the seizure of a person by or with the acquiescence of public officials, followed by a refusal to acknowledge the seizure and subsequent detention. See HURST HANNUM, GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, at 71 (2nd ed 1994).

meted out stern punishment to them and they went to hell.'"²⁵

Unfortunately for the Kurds, there were internal rivalries amongst the various Kurdish tribal factions resulting in lack of unity and diminished strength in resisting the Iraqi government.²⁶ The resistance to the Ba'ath government by the Kurds was also complicated by the Iran - Iraq War lasting from 1980 until 1988.²⁷ Depending upon whether the Kurds aligned with Iran or Iraq during the war impacted upon their fate. Those Kurdish fighters that supported Iran during the war were promised harsh consequences when it ended and those that aided Iraq were promised the Ba'ath Party's commitment to Kurdish autonomy. The future Iraqi foreign minister, Tariz Aziz, discussed such support with one faction of Kurdish guerilla fighters led by Jalal Talabani. "He told us, 'If you help us, we will never forget it. But if you oppose us, we will never forget it. And after the [Iran - Iraq] war is over, we will destroy you and all your villages completely.' It was not an empty threat."²⁸ Throughout the war, some Kurds supported Iraq and others Iran. As that war came to an end in 1987, the internal "war" against the Kurds began.

B. The Anfal

1. *Prelude and Players.* Iraq had an arguably legitimate military goal of combating insurgency, however, the "features of Anfal far transcend the realm of counter insurgency."²⁹ The man designated to direct Anfal was Ali Hassan al-Majid, cousin of Saddam Hussein and one of the loyal Ba'ath Party leaders. He was to command the Northern Bureau of the Ba'ath Party organization, based in the city of Kirkuk. This was the first time the Party itself assumed direct control for resolving the problems with the Kurds.³⁰

Ali Hassan al-Majid had a reputation for being especially brutal; on one occasion, not during Anfal, he personally shot and executed 25 to 30 prisoners, 6 of whom were children.³¹ He began this battle in March 1987. Hussein had granted al-Majid "exceptional or emergency powers" akin to those held only by the President himself: he could unilaterally impose the death penalty; he could issue orders to both the national military, including intelligence branches, and the

²⁵ *Id.*, at 41, quoting from *Al Iraq*, September 13, 1983.

²⁶ *Id.*, at 41 - 43.

²⁷ *Id.*, at 38 - 50; see also HELMS, *supra* note 6, at 163 - 194. During the Iran-Iraq War, Saddam and the Iranians were each estimated to have had 1 million troops in battle. Saddam mistakenly believed he would win the war quickly. Instead, it was one of the longest, most savage, and senseless armed conflicts of modern history. Over 8 years, the front barely changed. Estimates of casualties were difficult to ascertain because Iraq did not want the public to know the extent of the slaughter. About 160,00 to 300,000 Iraqis and about 320,000 to 580,000 Iranians died in that war. See HUMAN IN RIGHTS IN IRAQ, *supra* note 21, at 4 - 5.

²⁸ GENOCIDE, *supra* note 3, at 43, quoting an interview with Naywshirwan Mustafa Amin, Washington D.C., May 2, 1993.

²⁹ *Id.*, at 12 - 13.

³⁰ *Id.*, at 51 - 52.

³¹ *Id.*, at 52 - 53, footnote 4.

local domestic security forces; and he could set his own budget.³² His overall goal was to "Arabize" the area and to put an end to "[t]hirty . . . years of saboteur activity . . . All of this basin, from Koysinjag to [Kirkuk] . . . I'm going to evacuate it. I will evacuate it as far as Gweir and Mosul. No human beings except on the main roads. For five years I won't allow any human existence there. . . . If we don't act in this way the saboteurs activities will never end, not for a million years."³³ So he planned to extinguish the threat of Kurdish insurrection once and for all.

The method by which al-Majid would achieve his goal was to set in place a compartmentalized bureaucratic regime not unlike that of the Nazis. The Nazis defined three steps necessary to destroy a scattered group of people: 1st definition; 2nd concentration; and, 3rd annihilation. "A destruction process has an inherent pattern. There is only one way in which a scattered group can be effectively destroyed. . . . [F]or no group can be killed without a concentration or seizure of the victims, and no victims can be segregated before the perpetrator knows who belongs to the group."³⁴ "The Kurdish genocide of 1987 - 1988, with the Anfal Campaign as its centerpiece, fits Hilbergs paradigm to perfection."³⁵ The Saddam regime defined the targeted group and areas, concentrated them in special locations, and then executed them by the tens of thousands.

The genocide began with al-Majid's designation of forbidden areas, followed by destruction of all the houses in the Kurdish villages located in those areas and relocation of all the villagers (definition and concentration). Prior to the inception of the actual Anfal Campaign in 1988, he ordered a preliminary attack on the Balison Valley.³⁶ On April 16, 1987, the valley, a long-time *pershmerga* stronghold, was bombed with chemical weapons. "Until this moment, no government had ever used chemical weapons against its own civilian population."³⁷ Ironically, at the time of the attack, most of the fighters were away. Given the physiological effects on the victims, the chemicals used were most likely mustard or nerve gas, or both.³⁸ Some of the victims who died at the scene of the attack were buried with tractors. The morgue staff that processed other casualties were threatened with death if they failed to preserve the secrecy of the

³² *Id.*, at 53 - 58.

³³ *Id.*, at 347 - 348, Appendix A, the Ali Hassan al-Majid [audio] Tapes.

³⁴ GENOCIDE, *supra* note 3, at 7 - 8, citing RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS, 267 (New York, 1985, student edition).

³⁵ *Id.*, at 8.

³⁶ *Id.*, at 60.

³⁷ *Id.*, at 61.

³⁸ *Id.* Mustard gas . . . causes itching, burning and inflammation on the skin, followed by swelling of tissues. After a day, small blisters form, which are vulnerable to fatal tissue degeneration and infection. Inhalation leads to pulmonary edema, in which fluid floods the lungs, causing suffocation. Nerve agents like Sarin disrupt communication between nerve cells and causes spasms, nausea, and possibly nervous system collapse and death. Another nerve gas VX prevents the transmission of nerve signals, causing loss of muscle control, respiratory paralysis and death. R. Jeffrey Smith, *Showdown with Iraq: Poison, Germ Weapons Would Not Be Direct Targets*, WASHINGTON POST, February 22, 1998, at A28.

incident.³⁹ "[M]ost of the dead appeared to be children and elderly people."⁴⁰ Those that survived and made it to a civilian hospital were ordered transferred to a military hospital soon afterwards. When the local doctors that had been treating the victims tried to verify their patients' arrival at the military hospital, they discovered that they never arrived.⁴¹ Of those that were captured, the men simply disappeared and the women and children were dumped three hours northeast of their village in a field with nothing.⁴² On June 11, 1987, the Iraqis orchestrated another chemical attack that only blinded the victims and caused the death of one baby.⁴³

During 1987, al-Majid issued various orders as he exercised his new special powers:

6 April - he took away property rights of saboteurs, thus subjecting all of their real and personal property to confiscation;⁴⁴

10 April - he suspended all the legal rights of villagers residing in the prohibited areas, including guidance not to hear any cases nor pay any pending claims;⁴⁵

1 May - he ordered the "execution of first degree relatives of 'saboteurs.' It had long been the policy of the regime to detain and punish the families of active Kurdish *peshmerga*, often by destroying their homes. But al-Majid now ordered their physical elimination . . . ;"

14 May - he authorized the execution of wounded civilians "after confirming their hostility to the authorities with the Party organization;"⁴⁶

3 June - he personally signed an order forbidding farming and any importation of goods in the prohibited area and "[w]ithin their jurisdiction, the armed forces must kill any human being or animal present within these areas. They are totally prohibited;"⁴⁷ and

20 June - probably the most significant written order issued by al-Majid and "stamped with the seal of the Revolutionary Command Council Northern Affairs Committee, this directive . . . expanded the June 3 instructions . . . including a direct incitement to pillage . . . and the boldest possible statement

³⁹ GENOCIDE, *supra* note 3, at 63 - 67.

⁴⁰ *Id.* at 68.

⁴¹ *Id.* at 67.

⁴² *Id.* at 67 - 70.

⁴³ *Id.* at 71.

⁴⁴ *Id.* at 77.

⁴⁵ *Id.* at 77.

⁴⁶ *Id.* at 77 - 79.

⁴⁷ *Id.* at 79 - 80.

of a policy of mass murder, ordered by the highest levels of the Iraqi regime.”

The order directed them to execute people, between the ages of 15 and 70, from villages, and it permitted the local leaders, *mustashars*, and local militia troops, *jahsh*, to keep all the property seized. The spoils of war concept is how the Koran defines the word “Anfal.”⁴⁸

2. The Census. After June 1987, the Iran - Iraq War delayed any further implementation of the Kurdish policies, however, a national census was ordered for 17 October 1987. This would continue the “definition” and “concentration” stages discussed by Hilberg, *infra*. At that time, all Iraqi people must have declared their ethnicity, citizenship and place of residence. The only ethnic options were Arab or Kurd, despite the fact that there were thousands of Assyrian Christians and Chaldeans and Yezidis in Iraq. The villages in the prohibited areas were no longer drawn on the official map and so in order to register people had to abandon their homes the census takers would not be coming to villages that technically did not exist. Failure to register meant losing one’s Iraqi citizenship and additionally, the government would regard the men as army deserters. Desertion carried the punishment of death. Surrendering to the “National Ranks” would not be accepted after 17 October.⁴⁹

3. The Beginning. The Anfal Campaign was organized into eight stages, carried out between 23 February 1988 and 6 September 1988. It was organized as an elaborate military campaign with the primary purpose of eradicating the Kurdish population in northern Iraq.⁵⁰ It was deemed to be a “final solution of Iraq’s Kurdish problem.”⁵¹ During a meeting with other Northern Bureau officials, al-Majid described his intentions. “I will kill them all with chemical weapons! Who is going to say anything? The international community? F__k them! The international community and those who will listen to them.”⁵² Ali Hassan al-Majid followed through with his promise of chemical attacks. He also caused the deaths of tens of thousands of Kurds directly by means of mass executions, and indirectly as a result of horrendous prison camp or “collection center” conditions and the resultant starvation and disease, either in the camps or as they fled for their lives.⁵³

4. First Anfal. The first attack of the campaign occurred in the Jafati Valley, between 23 February and 19 March. The valley is located just southeast of the huge Dukan Lake. This was an area of strategic significance, in that it was not only the headquarters of Jalal Talabani (leader of the Patriotic Union of Kurdistan [hereinafter PUK] faction of *peshmerga*⁵⁴) and home to many *peshmerga*

⁴⁸ *Id.* at 81 - 83.

⁴⁹ *Id.* at 84 - 90.

⁵⁰ *Id.* at 14.

⁵¹ *Id.* at 90.

⁵² *Id.* at 349.

⁵³ *Id.* at 16 - 20.

⁵⁴ *Id.* at xiii. The PUK was one of the two major Kurdish parties that supported and was in turn supported by Iran. The other party was the Kurdistan Democratic Party [hereinafter KDP]. As noted

fighters, but also it was well-defended as the surrounding mountains make it difficult to penetrate. The *peshmerga* had successfully resisted here for many years. There were about 500 small villages in the valley. Chemical weapons were dropped but were not very effective initially either due to poor aim or the unique terrain. Additionally, some *peshmerga* possessed gas masks previously provided by Iranians.

After chemical and conventional bombs were dropped, the ground troops of both the national Iraqi army and the domestic militia advanced into the area and bulldozed the villages. Survivors were told to leave or risk death. The first of several "trick amnesties" were issued - the government promised safety and then those that surrendered simply disappeared and were never heard from again.⁵⁵

"Every structure . . . was leveled with dynamite and bulldozers" and dead bodies were left to rot in the streets. Iranians came in later and buried about 3000 people in a mass grave.⁵⁶ PUK headquarters in Halabja had fallen after just a few weeks and the other main villages fell shortly thereafter. Total casualties were estimated between 3200 and 7000, in what was "the single greatest atrocity of the war against the Kurds. . . . The Halabja chemical attack was a harbinger of later Anfal policies. During each of the eight phases of the military campaign, dozens of them in all enough to terrify their residents with a reminder of what had befallen Halabja."⁵⁷ Special camps were set up for families of *peshmerga* and it was there that the next stage of mass killing so occurred.

5. Second Anfal. The next attack targeted the farming and lowlands on the edge of the Qara Dagh mountains. The chemical weapons used - here had the most lethal impact on the grazing animals, which died by the thousands. The humans that died "were bleeding from the mouth; it was as if their brains had exploded," explained Omar the farmer.⁵⁸ Several other villages were attacked with the chemical weapons, forcing mass panic and flight. People who surrendered, under promises of amnesty, were never seen again. A few *peshmerga* stubbornly resisted, but in the end, the people either were killed, fled, or surrendered and then disappeared. After the fighting subdued, the villages were razed to the ground.⁵⁹

6. Third Anfal. The next destination for destruction was Germain, another PUK bastion and the refuge for fleeing *peshmerga* and their families seeking solace from the first two Anfal. The army sent in a huge task force and began a "ferocious assault," cutting off all supply lines and capturing every living thing.⁶⁰

earlier, the various Kurdish factions did not always share the same goals nor methods of resistance. Neither did they always cooperate with one another.

⁵⁵ *Id.* at 92 - 111.

⁵⁶ *Id.* at 107.

⁵⁷ *Id.* at 108 - 109.

⁵⁸ *Id.* at 116.

⁵⁹ *Id.* 112 - 124.

⁶⁰ *Id.* at 129 - 130.

Escape routes were blocked, thus denying safety to many non-combatants. Over 100 villages were decimated. The troops returned a couple days after the fighting to ensure that all signs of life were literally wiped off the face of the earth. Chemicals were only used in one area of particularly strong resistance. They burned the houses and slaughtered the livestock.⁶¹ In several of these villages, the local tribal leaders, *mustashar*, told the people they would be protected if they surrendered. Later, when other villagers tried to find those who had turned themselves in, they were told that they had all disappeared.⁶²

In other villages, a different pattern was occurring: the Iraqi troops attacked; men were separated and taken away in trucks; homes were looted of anything of value; and villages were set on fire and bulldozed afterwards. Some people fled to nearby mountains; captured women and children were taken away; and if *peshmerga* fighters had resisted in any particular area, the entire population "disappeared." They called it being "Anfalized." This stage of the campaign took about 10 days before "all resistance . . . [had] been crushed." Fleeing civilians had been funneled into "collection centers" for further processing. If they tried to escape, they were killed. The prisoners were video-taped and visited by Ali Hassan al-Majid himself. He declared them "captured Iranian saboteurs" when in fact, most were ordinary Iraqi Kurdish peasants.⁶³

In the village of Chamchamal, an area which had survived Anfal, the townspeople staged an unarmed attack to help free some prisoners who were being trucked through their locale. The army responded by sending in MIG fighters jets and helicopter gun ships to shoot the crowd. Those that escaped were hunted down and executed in public. The deceased's family had to pay the cost of bullets.⁶⁴

The role of the *jahsh* (Kurdish militia) was ambiguous. Some protected and assisted the Iraqi army and enticed the villagers to succumb to false promises of amnesty. Their reward was worldly as they could keep the spoils seized from the villagers:

"The *peshmerga* are infidels and they shall be treated as such," a former *mustashar* was told in a seminar run by army intelligence officers. "You shall take any *peshmergas* property that you may seize while fighting them. Their wives are lawfully yours (*hallal*), as are their sheep and cattle." And indeed, the *jahsh* looted the abandoned villages mercilessly before they were burned and bulldozed to the ground.⁶⁵

⁶¹ *Id.* at 130 - 132.

⁶² *Id.* at 140.

⁶³ *Id.* at 141 - 155.

⁶⁴ *Id.* 157 - 158.

⁶⁵ *Id.* at 161, quoting from a Middle East Watch interview with former *mustashar*, Muhammad Ali Jaff, Suleinmaniyeh, May 11, 1992.

Other *jahsh* helped the Anfal victims escape or at least get food and water. Many people were saved in this manner. Giving some *jahsh* the benefit of the doubt, they did not always know the true intentions of the army and when they discovered it, they helped people escape.⁶⁶

When the Third Anfal was to continue on to the Badinan area, a KDP stronghold (the other major Kurdish party) which had been very loyal to Saddam Hussein, the villagers were given one more chance to "return to the national ranks" before attack. Al-Majid even visited the area and held a meeting with the local *mustashar*. The tribal leader poignantly questioned the true consequences of surrender and instead of getting the truth, he was threatened with being taken away immediately and executed.⁶⁷

7. *Fourth Anfal.* The Valley of the Lesser Zab River was an area "offer[ing] sanctuary to PUK forces fleeing the Third Anfal"; it was also an area where vast oil resources remained unexploited. This was the focus of the next battle. Unfortunately for the victims, the timing was immediately after a huge Iraqi victory over Iran and the army's morale was very high - they were invulnerable.⁶⁸ Over 200 villages were attacked, over 10,000 people were killed, and chemical weapons were used unmercifully at several key sites. Like the attack in Germain, the army's strategy was to attack simultaneously at several different locations and force the victims to flee through the only pre-ordained corridor. Instead of offering freedom, the escape route was a planned collection point. On this occasion though, the troops opened fire on people surrendering. "The consequences to civilians were devastating" as the people were blind and dying, fleeing in panic.⁶⁹

Looting was rampant. When one *jahsh* objected, an army officer told him, "These people are heading toward death, they cannot take money or gold with them. The law of the state says they are going to die."⁷⁰ Consistent with the emerging method of operation, people were segregated by sex, taken to processing centers, and those that hid and were later discovered ultimately disappeared. Women taken to Chamchamal who later questioned those in charge regarding the status of their men and teenage boys were told, "Your men have gone to hell."⁷¹

8. *Fifth, Sixth, and Seventh Anfal.* The focus of the next segment of the campaign was repeated attacks in the same area of Shaqlawa and Rawanduz mountain valleys. These valleys had already been decimated during an earlier stage of the Iran - Iraq War but were now providing refuge to the surviving PUK forces, who fled here to make their last stand. Geographically, the area provided

⁶⁶ *Id.* at 163 - 164.

⁶⁷ *Id.* at 165 - 166.

⁶⁸ *Id.* at 169 - 172.

⁶⁹ *Id.* at 172 - 179.

⁷⁰ *Id.* at 180.

⁷¹ *Id.* 190.

good coverage given the "steep mountains and narrow valleys".⁷² In fact, the coverage was so good, it took three separate assaults by the Iraqi army and over three months to accomplish their objectives. Regrettably, more resistance was met with more chemical attacks and unlike earlier battles, the funnel option for those in flight was not available. The Iraqis tried to cut off any avenue of escape into Iran. Some got through, but most of the population disappeared without distinction of age or sex, and typically, without regard to enticements of amnesty. At one point, there were daily chemical assaults, followed by dynamiting headquarters locations and villages. The Iraqis even desecrated graves in the cemetery.⁷³ Needless to say, the PUK resistance proved insufficient.

9. Final Anfal. All that remained of the *peshmerga* fighting forces was the KDP faction in the northern most section of Kurdistan. As a cease-fire with Iran loomed, Saddam seemed anxious to complete Anfal and sent orders to that effect. All that remained was to abolish the Kurdish Democratic Party, led by Masoud Barzani, son of the leader of the Barzani Revolution, Mullah Mustafa Barzani. The KDP had been very loyal to Tehran and the Iraqis held a particular hatred for them.⁷⁴ With exception of those tribes that made a separate peace with Baghdad, the Iraqis unleashed 200,000 troops to destroy the remaining 300 to 400 Kurdish villages of Badinan.⁷⁵

And they did. Over an area of about 60 miles, the chemical attacks were launched between 25 August and 6 September 1988. "The intent seems to have been less to kill than to spread mass terror."⁷⁶ The wind-born effects were more lethal than the primary ones; deaths came later either as a delayed reaction to the gases or as a "consequence of exposure, cold and hunger in the mountains where they fled; or the malnutrition and disease they endured in the camps after they were captured . . ." Physicians for Human Rights confirmed, based upon soil analysis performed later, the use of mustard and nerve gas.⁷⁷ Thousands of farm animals in the path of the wind perished. People suffered vomiting, blackened and peeling skin, frothing of the mouth, dizziness, blindness, and death. Village after village was attacked in the same manner.⁷⁸ Eventually, the KDP leadership sent word that they could not fight the chemicals and they advised people to surrender, since they could not get everyone across the border. "The revolution is over."⁷⁹

As victims fled across the Turkish border and attempted to cross the fast-flowing Greater Zab River, the Iraqis bombed the bridges preventing or greatly hampering escape. An estimated 65,000 to 80,000 were successful in getting to

⁷² *Id.* at 193 - 194.

⁷³ *Id.* at 193 - 206.

⁷⁴ *Id.* at 261 - 264.

⁷⁵ *Id.* at 265.

⁷⁶ *Id.* at 270.

⁷⁷ *Id.* at 270 - 271.

⁷⁸ *Id.* at 272 - 276.

⁷⁹ *Id.* at 277.

Turkey, while a number hid in the mountains; any Kurds who resisted were executed on the spot; and those that were captured were separated by sex - the men disappeared and the women and children were caged in animal pens for further processing and transport to the detention centers. The *peshmerga* resistance had not been so significant as to require their disappearance. Some estimates were over 3000 males dead, which amounted to almost the entire male population of the villages in the area. There was no accurate total count of all the dead.⁸⁰ On 6 September 1988, the Final Anfal ended and amnesty was declared.⁸¹

10. The Camps. Throughout Anfal and even after the amnesty was declared, captured Kurds were trucked to various detention centers to await execution or eventual relocation to areas outside the prohibited zones. Topzawa was the location established for the main processing camp. "At Topzawa, any notion that Anfal was simply a counter insurgency campaign evaporates."⁸² During periods of high volume, Tikrit was used to a lesser extent as another processing center.⁸³

The constant parallels to the Nazi concentration camp system were eerie. Immediately upon arrival, the people were segregated by sex. The commanders kept meticulous records. All prisoners were registered upon arrival. About 4000 to 5000 people arrived at a time for processing (fewer arrivals in Tikrit), often receiving no food for several days. Eventually, the people were separated into three groups: men and boys appearing capable of military service; women and children; and the elderly and infirm. The soldiers conducted body searches and took all their possessions, except the clothes the people were wearing. Beatings occurred on the spot. The intelligence agents running the camp interrogated the men regarding *peshmerga* activities and all of the Kurds were deemed to have *peshmerga* allegiance regardless of their answers.⁸⁴

Many people, mostly men, were beaten and tortured, throughout their stay at the camps, some to death. The incidents included: maiming - cutting off testicles and ears; exposure to the midday sun; being hung upside down; beatings on the soles of the feet with metal tubes and wooden batons; being kicked, punched, and slapped; some had their mustaches and beards burned; and some of the women were raped. The facilities were cement halls with strong bars on the windows and doors. Additionally, witnesses reported the deaths of many children from starvation.⁸⁵

Generally, people who survived Topzawa were taken away after a few weeks. The women were taken north to the prison at Dibs. The elderly were

⁸⁰ *Id.* at 277 - 289.

⁸¹ *Id.* at 290.

⁸² *Id.* at 209.

⁸³ *Id.* 217 -219.

⁸⁴ *Id.* at 210 - 217.

⁸⁵ *Id.*, at 214 - 236 and 290 - 295.

taken very far south through the barren desert, beyond the town of al-Samawa. Some were taken to the abandoned fortress at Nugra Salman; others disappeared, never arriving. The guards promised some prisoners that they would be sent to a "hell that is built especially for the Kurds."⁸⁶ Overall conditions were greatly improved over that of the processing centers, however, they were still gruesome. At one such camp, Nugra Salman, the food improved during Ramadan, but afterwards, it changed to a starvation diet of bread and contaminated water. Many Kurds were infected with lice and as many as a dozen people a day died. Abd-al-Quder Abdullah Askari, former head of one of the villages and leader of the inmates, counted "517 victims of inhumane" prison conditions; after he was released, other witnesses reported 45 more deaths. The dead bodies of the prisoners were left outside in the courtyard to rot. After several days, they were moved to shallow pits and the guards would take any money left on the corpses. The survivors were forbidden from cleaning the bodies or performing any burial rites. During the night, wild dogs would dig up the corpses and eat the remains. The awful conditions persisted until the general amnesty was declared and even afterwards as the survivors awaited relocation to the new settlement complexes, *mujamma'a*.⁸⁷

11. The Firing Squads. Middle East Watch discovered six survivors who witnessed the execution of tens of thousands of Iraqi Kurds. The miracle of their survival should not be diminished by the similarity of their stories. Generally, the system was to pack dozens of prisoners, bound and blindfolded, into trucks. A convoy of 30 to 50 trucks at a time traveled without food or water on a trip that took 10 to 18 hours. Eventually they stopped, usually at night time, so the events occurred under cover of darkness. One by one, the trucks would be emptied, shots would be fired, and the bodies would fall into trenches previously dug by bulldozers. The same bulldozers would follow behind and cover the bodies with the dirt piled up nearby.⁸⁸

Muhammad escaped just as his firing squad began shooting. He had loosened the ties on his wrists that bound him to the other men who stood before a freshly dug trench. He survived subsequent imprisonment, beatings by Arab villagers, and induction into the Iraqi army, on his path of survival. He was never turned over to the Amn, intelligence police, who may have discovered his background.⁸⁹

Ozer, Omar, Ibrahim, and Mustafa were all survivors from the same convoy. Two of them were captured draft-dodgers and the other two were prisoners tricked into believing promises of leniency. The men were separated based upon places or birth and some were loaded up onto trucks. The total convoy included about 1000 to 1500 prisoners. These men decided to fight their fate. "When the guards arrived to kill them, they would put up a struggle. 'Even

⁸⁶ *Id.* at 217 - 226.

⁸⁷ *Id.* at 222 - 237.

⁸⁸ *Id.* at 239 - 259.

⁸⁹ *Id.* at 240.

if only one of the thirty-five [in our truck] survived, it was worth the try,' said Ibrahim."⁹⁰ They heard the steady gunfire and the engines of the bulldozers. Through a tiny window in their vehicle, they watched three dozen men from the bus ahead of them shot by a uniformed firing squad and dragged into the freshly dug pits, even with some of them were still moving.⁹¹

When their vehicle was unloaded, Omar, Ozer, and Ibrahim helped fight the guards. Most of the men in the truck died, but these three survived with only wounds. Mustafa survived in one of the last trucks in the same convoy. He was put into the pit and when the squad shot they missed him completely. Once he removed his blindfold, he saw an endless trench with hundreds of corpses illuminated by the headlights of the trucks. He crawled over bodies to the rear edge of the trench and ran to the city of Ramadi. He eventually got to a complex of Iranian Kurds who had been previously relocated from the borders. Mass graves were later discovered outside Ramadi, as well as three other mass graves sites.⁹²

From the testimony of these five survivors, it is apparent that one of the principle purposes of Anfal was to exterminate all adult males of military service age captured in rural Iraqi Kurdistan. Firing squads murdered these Kurds by the tens of thousands with no semblance of due process, by virtue of nothing more than their age, their ethnicity and their presence in prohibited areas supposedly influenced by the parties of the Kurdish *peshmerga*.⁹³

Taymour was the last survivor. He was a part of the group of people captured during the Third Anfal in southern Germain. Half of the southern Germain people that disappeared were women and children. Taymour was a 12 year old "eyewitness to the mass killing of [those] women and children."⁹⁴ En route to the killing site, a number children died in the hot, closed vehicles. Each of the 30 vehicles in the convoy stopped in front of its own burial pit. Taymour was shot twice and left for dead in the darkness. He discovered another young girl alive, but she was too scared to run with him. He fled past 20 or more empty trenches. A Bedouin man and his family kept him alive for 3 days in their tent and then assisted him to a nearby town, where a friendly Arab family sheltered him for two years. He was eventually reunited with an uncle. When information about Anfal started to leak to the world outside Iraq, Taymour told his story on CBS's 60 Minutes program, on 23 February 1992.⁹⁵

⁹⁰ *Id.* at 241 - 245.

⁹¹ *Id.* at 246.

⁹² *Id.* at 241 - 253.

⁹³ *Id.* at 252-253.

⁹⁴ *Id.* at 254.

⁹⁵ *Id.* at 254 - 259.

C. Amnesty & Aftermath

Effective 6 September 1988, the RCC declared general amnesty for all Iraqi Kurds, by written decree number 736. It included the Kurds who were living outside of Iraq, but excluded the "traitor al-Talabani."⁹⁶ Secretary of State, George Shultz met with the Iraqi Minister of State, Saddoun Hammadi on 8 September 1988, whereupon he denounced the government's use of chemical weapons against the Kurds, calling it "unjustifiable and abhorrent . . . [and] unacceptable to the civilized world."⁹⁷ Al-Majid was granted more special power to go retrieve the Kurds in Turkey, who were embarrassing the Iraqis.

Those that survived would have restricted civil rights, until their loyalty was assured. They were relocated to housing complexes, outside their home villages and were forbidden from moving away. Anyone found in the prohibited areas was to be executed. People could not get ration cards for food, education, health care, or other government services without an identification card, which were only issued at the complexes. Some people were placed in areas without any infrastructure to support even basic needs or the capacity to issue the identification cards. After several years, they were provided with running water and electricity. Deserters and draft-dodgers were treated more harshly - beatings and only limited food. Several instances of Kurds disappearing occurred after the amnesty but then they seemed to stop. Farmers were allowed to work lands only if they agreed to act as government informers.

For unknown reasons, other minority groups, the Assyrian and Chaldean Christians and the Yezidis (ethnic Kurds with special religious beliefs) living in and around Mosul were also Anfalized. The Christians, despite their protests, had been classified as Arabs during the 1987 census. Like their Kurdish neighbors, their villages and churches, some of them over a thousand years old, were destroyed. After amnesty was declared and they surrendered, they were issued no papers and were taken to Dohuk. They were segregated from the Muslim Kurds, and all the men disappeared, while the women and children were relocated to barren mujamma'a.⁹⁸

The total number of dead was between 50,000 to 182,000. Ali Hassan al-Majid admitted that it "could not have been more than 100,000."⁹⁹ To date, no Iraqi has been punished for the genocide of the Kurds. Al-Majid's special powers were revoked on 23 April 1989 and the following December, the Northern Affairs Committee was abolished. He served as the Governor of occupied Kuwait in 1990 - 1991, and later, he was appointed Iraqi Minister of Defense, his current position.

Assuming that the facts as presented are sufficient evidence to prove it

⁹⁶ *Id.* at 297.

⁹⁷ *Id.* at 298, note 2, *quoting* HUMAN RIGHTS IN IRAQ, *supra*, note 21, at 108 - 110.

⁹⁸ *Id.* at 312 - 317.

⁹⁹ *Id.* at 345.

occurred, the following sections discuss the consequences that should result and the applicable law justifying those consequences.

III. THE HUMAN RIGHTS EVOLUTION

Human rights laws apply generally to the world at large - first, by means of adoption, ratification, and accession to treaties and conventions and, second, by those precepts universally accepted as customary law, including those to which states believe they are obligated to abide pursuant to the concept of *jus cogens*.

Some human rights laws are specifically applicable because of Iraq's ratification or accession to certain conventions, namely: UN Charter, Universal Declaration of Human Rights, as implemented by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, and the Genocide Convention. Various UN Security Council and General Assembly Resolutions and UN Secretary General Reports have also defined the Iraqi obligations under international law and the obligation Iraq owes its people. Genocide and chemical attacks upon the Iraqi Kurds were prohibited under the applicable law binding upon Iraq at that time. Several human rights enforcement mechanisms exist with which to resolve those violations. Part III, *infra*, will describe the human rights laws, Iraq's obligations thereunder, and the various enforcement mechanisms available.

A. The Law of Human Rights

The evolution of fundamental freedoms common to all human beings began after World War II. The world-community would not ignore governments that exterminated human beings and committed atrocities against their own citizens. The world would not allow human beings to disappear silently into the night. The Nazi holocaust was the impetus for the formation of the United Nations, the creation of the Universal Declaration of Human Rights and Fundamental Freedoms,¹⁰⁰ the passage of the Genocide Convention,¹⁰¹ and the basis for other human rights conventions,¹⁰² which will be discussed herein. Previously, it was up to national law to protect people against governmental oppression. If domestic law did not protect individuals, there was no international system of protection. "They had no internationally protected rights and they knew it."¹⁰³

1. United Nations Bill of Human Rights. Even as the UN Charter was being drafted, people were cynical about its potential effectiveness. "[T]here was 'an inherent absurdity' in an 'organization of governments, dedicating itself to protect human rights when, in all ages and climes, it is governments which have

¹⁰⁰ G. A. Res. 217 (III), U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

¹⁰¹ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S.277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

¹⁰² Buergenthal, *The Human Rights Revolution*, *supra*, note 2, at 4.

¹⁰³ *Id.* at 6.

been their principle violators.”¹⁰⁴ In this instance, the cynics were in error. As noted, the United Nations was created after World War II and its Charter provided the basis for modern-day international human rights law. Professor Sohn explains:

The modern rules of international law concerning human rights are the result of a silent revolution of the 1940's, a revolution that was almost unnoticed at the time. Its effects have now spread around the world, destroying idols to which humanity paid obeisance for centuries. Just as the French Revolution ended the divine rights of kings, the human rights revolution that began at the 1945 San Francisco Conference of the United Nations has deprived the sovereign states of the lordly privilege of being the sole possessor of rights under international law, to concede that individuals are no longer mere objects, mere pawns in the hands of states.¹⁰⁵

Although the concept of individuals possessing some inherent basic rights common to all human beings has an ancient history, the “concept that human rights are an appropriate subject for international regulation is very new,”¹⁰⁶ and began with the general pronouncement of those rights under the UN Charter.

The UN Charter Preamble and Articles 1, 55, and 56 are specifically relevant to the discussion herein. The Preamble expresses the determination of all the UN members “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person . . . and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law” would be achieved.¹⁰⁷ Article 1 explains that one of the purposes of the United Nations is, “to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction . . .”¹⁰⁸ Article 55 defines the member-state obligations to promote “universal respect for and observance of human rights and fundamental freedoms for all,” and Article 56 is the pledge of all members of the UN to take action to achieve the purposes set forth in Article 55.¹⁰⁹

¹⁰⁴ LASH, ELEANOR, *THE YEARS ALONE*, *supra* note 1, at 80, *citing*, HERBERT NICHOLAS, *THE UNITED NATION AS A POLITICAL INSTITUTION*, 132 (1960). The task of Mrs. Roosevelt's Commission of Human Rights was to draft an “international bill of rights.” The Universal Declaration and its subsequent implementing binding treaties became the “bill of human rights.” *See Id.*, at 57 and *see also* THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS*, 27 (2d. 1995).

¹⁰⁵ Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982).

¹⁰⁶ HURST HANNUM, *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 4 (2nd ed. 1994).

¹⁰⁷ CHARTER OF THE UNITED NATIONS, *reprinted at 1977 Yearbook of the United Nations* 1181, preamble [hereinafter UN CHARTER].

¹⁰⁸ *Id.* Art. 1.

¹⁰⁹ *Id.* Art. 55 and 56.

The UN Charter did not specifically define human rights, it left that challenge to subsequent documents and the existing and developing customary law. However, it "internationalized human rights" and set the stage for the adoption of the Universal Declaration of Human Rights and Fundamental Freedoms in 1948.¹¹⁰ Although the Universal Declaration was non-binding, it has evolved into the definitive norm for human rights law. "Because of its moral status and the legal and political importance it has acquired over the years, the Declaration ranks with the Magna Carta, the French Declaration of the Rights of Man and the American Declaration of Independence as a milestone in mankind's struggle for freedom and human dignity."¹¹¹

The Universal Declaration describes several articles which are relevant to the adjudication of the human rights violations encompassed herein: Article 2 prohibits distinction of the application of the rights based upon "the political, jurisdictional or international status of the country or territory to which a person belongs;" Article 3 protects the right to life; Article 5 forbids "torture, cruel, inhuman or degrading treatment or punishment;" Article 8 provides an effective remedy by the competent national tribunal for acts violating the fundamental rights granted; Article 9 prohibits exile; Article 10 entitles persons charged in criminal cases to a "fair and public hearing by an independent and impartial tribunal;" Article 12 precludes arbitrary interference with privacy, family or home; Article 13 declares freedom of movement and residence, including "the right to leave any country, including his own, and to return to his country;" Article 17 prohibits arbitrary deprivation of property; Article 21 grants everyone the "right to take part in the government of his country;" Article 22 grants people cultural rights; and Article 27 grants people "the right to freely participate in the cultural life of the community."¹¹²

During the United Nation's World Conference on Human Rights, held in Vienna in June 1993, the parties adopted a declaration that reiterated the continued importance of this non-binding Universal Declaration. "[T]he Universal Declaration of Human Rights, which constitutes a common standard of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in existing international human rights instruments"¹¹³

Two most significant and widely-ratified binding treaties implemented the Universal Declaration - but not until 18 years later. In 1966 the United Nations signed the International Covenant on Civil and Political Rights¹¹⁴

¹¹⁰ THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS 25 (2d ed. 1995) (hereinafter BUERGENTHAL, HUMAN RIGHTS). See also Universal Declaration, *supra*, note 102.

¹¹¹ *Id.* at 30.

¹¹² Universal Declaration, *supra* note 102.

¹¹³ The Vienna Declaration and Programme of Action, adopted 25 June 1993 by the World Conference on Human Rights, Prologue.

¹¹⁴ International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, entered into force 23 Mar. 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

[hereinafter ICCPR] and the International Covenant on Economic, Social and Cultural Rights¹¹⁵ [hereinafter ICESCR]. They entered into force in 1976. These conventions basically adopt sections of the Universal Declaration, with slight modification, dividing civil and political rights separately from economic, social and cultural rights. The ICCPRs enforcement mechanisms are very different from those of the ICESCR. A number of sections of the ICCPR are relevant here and those will be listed, however, by far the most important right is that described in Article 6 - the absolute right to life which includes the prohibition against arbitrary taking of life and provides for the right to seek appeal or pardon of a death penalty sentence by a competent tribunal. It specifies further, "When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Genocide Convention." Finally, it prohibits imposition of the death penalty on children under the age of 18 and pregnant women.¹¹⁶

Other applicable rights include: Article 1 provides the right to self-determination and the prohibition against the State from denying people its means of subsistence; Article 4 prohibits derogation of the rights under articles 6, 7, 8, 11, 15, 16 and 18, even during public emergencies; Article 7 prohibits torture and inhuman treatment; Article 9 proclaims the right to be free from arbitrary arrest or detention; Article 10 requires prisoners to be treated with dignity; Article 12 ensures freedom of movement; Article 14 delineates due process requirements; Article 17 forbids interference with privacy, family, and home; Article 25 declares the right to public participation in the government; and Article 27 provides the right to exercise ethnic minority culture.¹¹⁷

The ICESCR is also a binding treaty defining and specifically describing various human rights described in the Universal Declaration. Those relevant to the circumstances regarding the Iraqi genocide of the Kurds include: the right to self-determination; the right to the protection of the family; the right to the enjoyment of the highest attainable standard of physical and mental health; and the right to take part in cultural life.¹¹⁸

Finally, although some are inclined to minimize the rights under the ICESCR, during the World Conference on Human Rights in summer of 1993, in which 171 nations participated, the UN Secretary General, Boutros Boutros-Ghali, proclaimed the universality of human rights in general and he demanded that the world stop distinguishing between Civil and Political Rights versus Economic, Social and Cultural Rights.¹¹⁹ In the Vienna Declaration subsequently adopted at

¹¹⁵ International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1966, entered into force 3 Jan. 1976, 999 U.N.T.S. 3 [hereinafter ICESCR].

¹¹⁶ ICCPR, *supra* note 116, Art. 6.

¹¹⁷ *Id.* Art. 1, 4, 7, 9, 10, 12, 14, 17, 25, and 27.

¹¹⁸ ICESCR, *supra*, note 117, Art. 1, 10, 12, and 15.

¹¹⁹ World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/Conf. 157/23, at 10 - 12 (1993).

the Conference, the parties emphasized that,

[T]he Universal Declaration of Human Rights, which constitutes a common standard of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments, in particular the International Covenant on Civil and Political Rights and the International covenant on Economic, Social, and Cultural Rights.¹²⁰

Further they declared that, "Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments."¹²¹

2. *Genocide Convention.* The Genocide Convention followed a General Assembly Resolution that declared genocide an international crime and demanded that ECOSOC draft a convention memorializing its prohibition.¹²² By 9 December 1948, the Genocide Convention was prepared and approved by the General Assembly. It entered into force on 12 January 1951.¹²³ "Genocide" was a term first used by the Polish scholar, Raphael Lemkin. He defined it as "the destruction of a nation or an ethnic group."¹²⁴ So, too, did the Convention define genocide. It was a crime in peace or during war; its prohibition would become a matter of customary law; it included acts besides killing; covered a broad scope of liability; and required specific intent to "destroy a particular group."¹²⁵

Specific provisions include, first, that genocide is a crime in peace or war and the Parties agree to punish and prevent its violations. Next, to be a crime, the actions must be done with "intent to destroy, in whole or in part, a national, ethnic, racial, or religious group." The acts listed include: killing, infliction of serious mental or physical harm, creating "conditions of life" designed to implement the destruction of the group, taking measures to "prevent births," and the forcible transfer of children. Subsequent articles describe direct and indirect culpability, including leadership liability. Further, Parties to the Convention agreed to enact domestic legislation implementing the Convention. Finally, other Articles provide for domestic or international criminal trials of perpetrators.¹²⁶

¹²⁰ *Id.* at 26.

¹²¹ *Id.* at 28.

¹²² G.A. Res 96 (1946).

¹²³ DOCUMENTS ON THE LAWS OF WAR, at 157 (Adam Roberts & Richard Guelff eds., 2d ed. 1989).

¹²⁴ RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* at 79 (1944). "For Lemkin, the critical element of genocide was that . . . it had a broader aim to destroy entire human collectives." See Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Genocide Conventions' Blind Spot*, 106 YALE L.J. 2259, at 2262 - 2263 (1997).

¹²⁵ DOCUMENTS ON THE LAWS OF WAR, *supra* note 125, at 157 - 158.

¹²⁶ Genocide Convention, 78 U.N.T.S. 277 (entry into force 12 Jan 1951).

3. *Customary International Law.* "[T]he primary sources of the [international] law are custom and treaties."¹²⁷ Custom as a source of international law, derives from the actual practices of states. Its importance derives from its being an interpretive aid or definitional source for some concepts listed in treaties, conventions or other international agreements and its independent significance in that it has become the *de facto* standard by which all states are considered bound, whether parties to various treaties or not.¹²⁸

Notions of right and wrong common to all nations and all human beings are the essence of the customary law on human rights. As the classic Naturalist philosopher, Father Francisco Suarez explained in the 1600's:

The human race though divided into different nations states still has a certain unity, . . . politically and morally as is indicated by the precept of mutual love and charity which extends to all, even to strangers of any nation whatsoever. Therefore, though each perfect polity, republic, or kingdom is in itself a perfect community, consisting of its members, nevertheless each of these communities, . . . as it is related to the human race, is in a sense also a member of the universal society. . . . [T]hey need rules by which they are guided Hence certain rules could be established by the customs of these nations.¹²⁹

"Could be" and have been established - the world, today, recognizes various fundamental rights as part of international customary law. The customary laws did not get replaced by subsequent conventions. In fact, many of the pertinent conventions have become regarded as evidence of custom, themselves. Those treaties still allow for further definition and continued respect for "the laws of humanity" and "the dictates of public conscience." Some conventions are so widely ratified that they have become accepted as evidence of customary law. Those relevant here include: 1899 and 1907 Hague Regulations; 1925 Geneva Convention prohibiting the use of chemical and biological weapons; 1948 Universal Declaration; 1949 Genocide Convention; and, the four 1949 Geneva Conventions.¹³⁰

As mentioned, the Universal Declaration has also given rise to customary international law, for at least some rights. "The following governmental practices violat[e] international law: genocide, slavery, murder or causing the disappearance of individuals, torture or other cruel or inhuman or degrading

¹²⁷ DOCUMENTS ON THE LAWS OF WAR, *supra* note 125, at 6.

¹²⁸ See generally *id.*, at 4. See also BUERGENTHAL, HUMAN RIGHTS, *supra*, note 113, at 19 - 20, and MARK JANIS & JOHN NOYES, INTERNATIONAL LAW, 66 (1977).

¹²⁹ ROBERT J. BECK ET AL, INTERNATIONAL RULES, 35 (1996), quoting FRANCISCO SUAREZ, DE OFFICIIS

¹³⁰ DOCUMENTS ON THE LAWS OF WAR, *supra* note 125, at 169 - 170. See also BUERGENTHAL, HUMAN RIGHTS, *supra*, note 113, at 33 - 38. See generally Prosecutor v. Dusko Tadic a/k/a "Dule," Case IT-94-1-T (Opinion and Judgement) (7 May 1997).

treatment or punishment, . . . systemic discrimination, and consistent patterns of gross violations of internationally recognized human rights."¹³¹ War crimes are also included in the universal jurisdiction section of the RESTATEMENT.¹³²

Other customary law principles from the Law of War context include, first, the principle that even during war, the right to injure the enemy is not unlimited.¹³³ Second, use of force must be proportional and combatants must exercise discrimination with regard to methods of conducting war, type of weapons and appropriate targeting that minimizes harm to non-combatants.¹³⁴ Finally, custom also includes limits upon military necessity - minimum force necessary to accomplish the military objective; humanity - forbids use of force beyond what is needed to force the enemy into submission; and chivalry - honorable conduct during armed conflict.¹³⁵

In general, customary international law is binding on all states. Principles of customary law may come to be codified in a particular agreement: in such a case, the principle remains binding on all states as customary law, but those parties to the agreement are further bound through their treaty obligations. Customary law may also develop to bring the substance of pre-existing written agreements within its ambit; in such a case, the particular agreement (which is already binding upon all the states which are parties to it) then becomes generally binding upon all states as customary law.¹³⁶

4. Regional Human Rights. Besides UN treaties and international custom, there are three regional human rights systems, implementing human rights laws. Although none are directly applicable to Iraq, they provide a possible regional reaction to Iraq's atrocities and a potential framework for the Middle Eastern countries to emulate. Europe is reputed to be the most aggressive and experienced region in enforcing human rights. In fact, Europe adopted its human rights treaty in 1950 - long before the UN implemented the Universal Declaration with its binding treaties.¹³⁷ The Inter-American human rights system stems from the Organization of American States [hereinafter OAS] Charter and the American Convention on Human Rights.¹³⁸ Finally, the Organization of African Unity

¹³¹ BUERGENTHAL, HUMAN RIGHTS, *supra*, note 113, at 36. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702.

¹³² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404.

¹³³ 1899 and 1907 Hague Regulations, *reprinted in*, THE HAGUE CONVENTIONS AND DECLARATION OF 1899 AND 1907 (J. B. Scott ed. & trans., 3d ed. 1918); 1981 UN Weapons Convention, Doc. A/CONF. 95/15, Preamble (entry into force 2 Dec. 1983).

¹³⁴ DOCUMENTS ON THE LAWS OF WAR, *supra* note 125, at 5.

¹³⁵ *Id.*

¹³⁶ DOCUMENTS ON THE LAWS OF WAR, *supra* note 125, at 6.

¹³⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950 (entered into force Sep. 3, 1953) [hereinafter European Convention].

¹³⁸ American Convention on Human Rights, "Pact of San Jose, Costa Rica," Nov. 22, 1969 (entered

[hereinafter OAU] and its member nations adopted its Charter on Human and Peoples Rights in 1981.¹³⁹ The regional enforcement mechanisms as described *infra*, may establish a potential structure for solutions in Iraq.

B. Iraq's Legal Obligations

Iraq's legal obligations, like every other nation, are based upon custom and convention. As discussed previously, all states are obliged to comply with customary law, regardless of treaty ratification status, and Iraq is no exception. Those obligations are contained in the UN Charter, the Universal Declaration, the Genocide Convention, the 1949 Geneva Conventions, ICCPR, ICESCR, the Geneva Protocol prohibiting the use of biological and chemical weapons, and other general principles of humanitarian and human rights laws.

into force 1978) [hereinafter American Convention].

¹³⁹ African Charter on Human and Peoples Rights, Jun 27, 1981 (entered into force 1986) [hereinafter African Charter].

Iraq's most significant obligations related to the genocide of the Kurds stem from the UN Charter, where it agreed to respect and promote universal human rights; the ICCPR where it agreed to respect the right to life and prohibit genocide without derogation; the Genocide Convention, where it agreed not to commit killing and all related actions done with intent to destroy an ethnic group; and the 1949 Geneva Conventions, where it agreed to protect civilians, treat all persons humanely, avoid outrages against human dignity, and provide minimum due process prior to executions.¹⁴⁰

Iraq has specifically ratified or acceded to the following human rights conventions without reservations, unless otherwise noted: UN Charter; Genocide Convention (reserving the right to have it binding only in regard to other signatories); 1949 Geneva Conventions; ICCPR; and ICESCR.¹⁴¹ Iraq is obligated to comply with the customary law principles described *supra*, including those agreements which are considered codifications of such.

C. Human Rights Enforcement Mechanisms

Human rights are enforced via both the UN and the regional human rights commissions and court systems. Domestic courts also enforce human rights, however, this thesis will focus upon international enforcement.

1. *United Nations System.* The UN established the UN Commission on Human Rights [hereinafter Commission] in 1946. The Commission reports to the UN Economic and Social Committee [hereinafter ECOSOC] with regard to human rights matters. The Commission is "charter-based" has its roots in the UN Charter. Basically, it investigates human rights violations using special working groups and a rapporteur system. Under Resolution 1235,¹⁴² the Commission examines "gross violations," (apartheid was considered such) by conducting an investigation or study of the situation and reporting the results to ECOSOC.¹⁴³ Resolution 1503 provides a limited petition system whereby the Commission considers communications that reveal a "consistent pattern of gross violations."¹⁴⁴ Individuals or NGO's with direct or reliable information may file petitions, as long as they establish that domestic remedies have been exhausted or are otherwise ineffective.¹⁴⁵ A sub-commission is created to determine whether to refer this matter to the Commission. The Commission can then make a "thorough study"

¹⁴⁰ UN Charter, reprinted in 1983 Yearbook of the UN, 1325 (entry into force 24 Oct. 1945); International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (entered into force 23 Mar. 1976); Genocide Convention, 78 U.N.T.S. 277 (entered into force 12 Jan. 1951); and 1949 Geneva Conventions 75 U.N.T.S. 31 (entered into force 21 Oct. 1950).

¹⁴¹ *Id.* and see also HANNUM, HUMAN RIGHTS PRACTICE, *supra* note 108, at Appendix E, Ratifications of Selected Human Rights Instruments 280 - 290.

¹⁴² ECOSOC Res. 1235 (XLII) of June 6, 1967.

¹⁴³ BUERGENTHAL, HUMAN RIGHTS, *supra* note 113, 89-90. ECOSOC did assign a Special Rapporteur on Iraq in 1991. Its mandate was to investigate human rights abuses surrounding the events of the Gulf War. See HANNUM, *supra* note 108, at 63.

¹⁴⁴ ECOSOC Res. 1503 (XLVII) of May 27, 1970.

¹⁴⁵ *Id.*

or establish an *ad hoc* committee.¹⁴⁶ The Commission is criticized because it has no obligation to keep the petitioner informed and the reports stay confidential, unless the Commission chooses to release the information. The Commission, undoubtedly, uses the threat of publicity to "encourage" states in violation to mend their ways.

After the 1993 World Conference on Human Rights, the UN dedicated a new "High Commissioner of Human Rights" who has the rank of Under-Secretary-General of the UN. The High Commissioner's primary goal is "removing the current obstacles and in meeting the challenges to the full realization of all human rights and preventing the continuation of human rights violations throughout the world."¹⁴⁷ The High Commissioner has continued to renew the mandate of the Special Rapporteur for Iraq that was originally assigned by the Commission on Human Rights in 1991. As noted in footnote 145, *supra*, fact-finding had begun shortly after the Gulf War and continues to-date. The most recent report of the Special Rapporteur will be discussed in greater detail, *infra*.¹⁴⁸

The Human Rights Committee [hereinafter HRC], on the other hand, operates more like a judiciary. HRC was created under Article 28 of the ICCPR and hence is "treaty-based." HRC administers the State reports submitted in accordance with Article 40(1). States that are parties to the ICCPR are required to submit reports explaining the progress they have made in the human rights domain. Their responses are subjected to close scrutiny by the HRC who questions them and issues recommendations for improvement. HRC also resolves *inter-state* complaints. States may report on other states for human rights violations and HRC acts as a mediator with the chief purpose of finding and recommending settlement details.¹⁴⁹

For states that have ratified the first Optional Protocol to the ICCPR, HRC has established an individual petition system.¹⁵⁰ Private parties have the power to file complaints against States.¹⁵¹ Communications are first determined "admissible" if domestic remedies have been exhausted and if so, HRC decides the case on the merits.¹⁵² While the case is pending, HRC has the power to recommend interim measures to "avoid irreparable damage."¹⁵³ As HRC resolves the complaint on the merits, it first brings the matter to the attention of the state incriminated. The state is given the opportunity to respond. Next, HRC reviews the

¹⁴⁶ BUERGENTHAL, HUMAN RIGHTS, *supra* note 113, at 89 - 91.

¹⁴⁷ UN G.A. Res. 48/141, § 4(f) (1994).

¹⁴⁸ UN HCHR Res. 1996/72 adopted 23 April 1996 and ECOSOC Doc. E/CN.4/1997/57 dated 21 Feb 1997.

¹⁴⁹ ICCPR, *supra* note 116, Art. 28 - 45. See also, BUERGENTHAL, HUMAN RIGHTS, *supra* note 113, at 43 - 48.

¹⁵⁰ Optional Protocol to the ICCPR, UN GAOR 21 Sess., Supp. No. 16, UN Doc. A/6316 (1966).

¹⁵¹ *Id.* Art. 1 - 2.

¹⁵² *Id.* Art 2, 3, and 5.

¹⁵³ BUERGENTHAL, HUMAN RIGHTS, *supra* note 113, at 50 citing Rules of Procedure of the HRC, Rule 86.

written "communications" of both the state and the petitioner and makes findings which are then disclosed to the parties. The HRC publishes all its findings in an annual report filed with the General Assembly.¹⁵⁴ If a state is found to have violated human rights under either the ICCPR or the first Optional Protocol, the state must then report on their efforts to remedy the situation until it is resolved.

HRC can recommend specific measures - compensation, enact appropriate legislation, for example but has no "power" to enforce the recommendation *per se*.¹⁵⁵

The ICESCR has no specific enforcement mechanism, "no inter-state or individual complaint system."¹⁵⁶ Parties that have issues involving those rights just submit written reports describing "the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein."¹⁵⁷ Reports go to the ECOSOC, no special or dedicated committee. Significant breaches in a party's obligation may be brought to the attention of the UN General Assembly and that is seen to be persuasive in many cases.¹⁵⁸

2. Regional Enforcement Systems. The regional enforcement of human rights is performed in three systems: European, Inter-American, and African. Europe's system is the oldest and reputedly the most determined and effective in enforcing human rights. Two of the systems, European and Inter-American, have separate Courts in addition to human rights commissions. The Courts function, at least in Europe, even better than the UN equivalent, the HRC.¹⁵⁹ But note, many of the Parties to the European Convention have made its provisions a matter of their domestic law, thereby "creating rights directly enforceable by individuals" in the national courts, first.¹⁶⁰

The Inter-American human rights system is newer and more complex than the European system. It has both charter-based and treaty-based systems because some of the sources for human rights stem from the OAS Charter and others are based upon the American Convention on Human Rights - not all states are parties to both hence the complexity.¹⁶¹ Like the European system, the treaty-based American Commission resolves both inter-state and individual petitions but dissimilarly, the American Commission has no mandatory inter-state procedures

¹⁵⁴ *Id.* at 49. See also ICCPR, *supra* note 116, art. 45; Optional Protocol, *supra* note 152, at Art. 6.

¹⁵⁵ BUERGENTHAL, HUMAN RIGHTS, *supra* note 113, at 47 - 48.

¹⁵⁶ *Id.*

¹⁵⁷ ICESCR, *supra* note 117, art. 16(1).

¹⁵⁸ BUERGENTHAL, HUMAN RIGHTS, *supra* note 113, at 51 - 57.

¹⁵⁹ See generally, *Id.*

¹⁶⁰ BUERGENTHAL, HUMAN RIGHTS, *supra* note 113, at 108. See also, European Convention, *supra* note 139. Europe adopted the Convention on Human Rights and Fundamental Freedoms in November, 1950 and it entered into force 3 years later. The rights guaranteed were modeled after the Universal Declaration but given that the Holocaust happened in its backyard, Europe was not willing to wait until the UN treaties were ratified.

¹⁶¹ BUERGENTHAL, HUMAN RIGHTS, *supra* note 113, 175. See also American Convention, *supra* note 140.

- it may only hear inter-state complaints if both States have ratified the American Convention and recognize its jurisdiction.¹⁶² On the other hand, *in re* individual petitions, any person or NGO or group of people may file, not just victims, in accordance with Article 44. Judgments include money damages, declarations of wrongdoing, and recommendations for remedial State actions.¹⁶³ Enforcement of the judgment does not involve a separate mechanism, like the Committee of Ministers in Europe, but will be discussed at OAS General Assembly meetings with the Court submitting a report.¹⁶⁴ On a progressively positive note, "The American Convention is the only major human rights treaty that expressly authorizes the issuance of temporary restraining orders," per Article 63.¹⁶⁵ Also, the Inter-American Court of Human Rights has imposed an affirmative obligation on states to prevent human rights violations, counting those done by private actors or the state risks liability upon itself for those wrongs.¹⁶⁶

The OAU's African Charter guarantees individual and peoples rights and duties and very liberally incorporates other "international declarations and covenants,"¹⁶⁷ however, it also permits tremendous "clawback clauses" which allow states to almost completely restrict the rights they've just granted.¹⁶⁸ The individual complaint system is similar to the UN Charter-based system under Resolution 1503¹⁶⁹ and similar to the ICCPR (in part), in that the African Charter established an inter-state complaint system but with two options. In the first option, the states basically just raise matters amongst themselves; negotiations may take years.¹⁷⁰ Under the second option, the state could petition the African Commission directly. The system does not provide for adjudication of any individual complaints and there is no human rights court. Critics contend that the African system's "only real sanction - publicity - is severely limited by the powers the African Charter vests in the Assembly, which is a political body that is not likely to be an enthusiastic guardian of human rights as currently constituted."¹⁷¹

3. Other Human Rights Enforcement Mechanisms. Prior to 1945, treaties did not adequately provide for punishment of those in violation of the earliest human rights law, found in the various Hague and Geneva Conventions. Most cases for violations of law of war, civil or criminal, were resolved by national courts. After World War I, for example, Germany conducted its own

¹⁶² American Convention, *supra* note 140, art. 44 - 45.

¹⁶³ BUERGENTHAL, HUMAN RIGHTS, *supra* note 113, at 212-213. *See also, id.*, art 63 and 68.

¹⁶⁴ American Convention, *supra* note 140, art. 65.

¹⁶⁵ BUERGENTHAL, HUMAN RIGHTS, *supra* note 113, at 215.

¹⁶⁶ Velasquez Rodriguez Case, 4 Inter-Am. Ct. H.R. (Ser.C) at 154 - 155 (Judgement of July 29, 1988).

¹⁶⁷ African Charter, *supra* note 141, art. 18.

¹⁶⁸ BUERGENTHAL, HUMAN RIGHTS, *supra* note 113, at 233.

¹⁶⁹ BUERGENTHAL, HUMAN RIGHTS, *supra* note 113, at 245.

¹⁷⁰ *Id.* at 243.

¹⁷¹ BUERGENTHAL, HUMAN RIGHTS, *supra* note 113, at 247.

trial of German war crimes offenders and "very few were convicted."¹⁷² Most of the offenders tried immediately after World War II were also tried in domestic courts. The trials conducted by the International Military Tribunals at Nuremberg and Tokyo were thus the exceptional resolutions. Both Tribunals declared jurisdiction over crimes against humanity, war crimes, and crimes against the peace.¹⁷³

It is upon those trials and the creation of those tribunals that the International Criminal Tribunals for the former Yugoslavia [hereinafter ICTY] and Rwanda [hereinafter ICTR] were founded another enforcement mechanism available. In 1993 and 1994, the Security Council created these Tribunals which have international criminal jurisdiction over violators of human rights. The Tribunals have the power to prosecute those people who committed atrocities during mostly civil wars, including the power to sentence the guilty to up to life in prison.¹⁷⁴ Significantly more will be discussed on this subject in Part IV, *infra*.

Next, various resolutions condemning human rights violations, imposing economic sanctions and authorizing the use of force have all been used to "encourage" compliance with human rights norms. Additionally, human rights law has even been granted jurisdiction in domestic civil court to recover civil damages for injuries suffered as a result of the atrocities similar to those mentioned above.¹⁷⁵ Finally, the potential for enforcing human rights law can be

¹⁷² DOCUMENTS ON LAWS OF WAR, *supra* note 125, at 153.

¹⁷³ *Id.*

¹⁷⁴ S.C. Res. 827 (25 May 1993). When the UN Security Council created the ICTY, the world-community was agreeing that there were certain minimum rights for all human beings. The world is overriding domestic sovereignty with this Tribunal and although it may not be able to agree on all of the rights inherent to all human beings, it is agreeing that these rights should include: no murder, torture, cruelty to anyone. Notions of the "sacrosanctness" of state sovereignty have eroded in the area of human rights.

¹⁷⁵ *Kadic v. Karadzic*, 70 F.3d 232 (1995). The UN Statute for the Tribunal specifically preserved the ability of victims to recover civil damages, separate from the criminal liability, and so the United States

seen as early as 1970, in the *Barcelona Traction Case*, when the International Court of Justice recognized the "obligations *erga omnes*," the obligations states owe the international community as a whole to enforce human rights. Examples given included not permitting state aggression, genocide, slavery or racial discrimination.¹⁷⁶ The International Law Commission has endorsed this concept and this case specifically.¹⁷⁷

IV. COMPARISON TO YUGOSLAVIA & RWANDA

Circuit Court of Appeals upheld the "universal jurisdiction" over acts committed pursuant to the genocide campaign carried out by Karadzic's military forces and granted *in personam* jurisdiction.

¹⁷⁶ *Barcelona Traction Case*, Belgium v. Spain, 1970 I.C.J. 3, § 33 and 34.

¹⁷⁷ U.N. GAOR, 31st Sess., Supp. No. 10, at 170, U.N. Doc. A/31/10 (1976), art. 19(3), *reprinted in 2 Yearbook of the International Law Commission*, 73, U.N. Doc. A/CN.4/Ser.A/1976/Add.1 (1976).

When law, whether domestic or international, mirrors the aspirations of society and captures its imagination, it acquires a moral and political force whose impact can rarely be predicted. It often far exceeds our wildest expectations or fears of those responsible for its promulgation or of those who oppose it. The lessons history teaches about the power of ideas and the irony of hypocrisy should be studied very carefully by all of us who are interested in a world in which human beings can live in dignity and peace. These lessons are particularly telling when we look at the role the human rights revolution is playing today in many parts of the world. That revolution is proving ever more convincingly that so-called political realism, which discounts all but military and economic power, has no monopoly on political wisdom nor is it all that realistic. We may need bread to live, but we are sustained as human beings by our dreams and our hopes for a better tomorrow: for freedom, for human dignity. That, ultimately, is what the human rights revolution is all about and why it is succeeding.¹⁷⁸

For the world to usurp domestic, criminal jurisdiction from sovereign states was nearly unprecedented. The reason? The world has undergone the "human rights revolution" quoted again, above. Professor Buergenthal discussed this "revolution" or evolution as previously described, and the role it was playing in the world in 1991 as the United Nations began to take measures against Iraq for its invasion of Kuwait.¹⁷⁹ He must have had a premonition that this "revolution," evidenced by the burgeoning of world-wide acceptance of certain basic, individual, and fundamental freedoms and rights, would lead to the creation of the ICTY and ICTR only a few years later.

"The unconscionable atrocities in former Yugoslavia and Rwanda have become the twin pillars of moral outrage upon which the beginnings of a long-awaited international criminal jurisdiction can be discerned."¹⁸⁰ The International Criminal Tribunal for the former Yugoslavia was the world-community's response to brutal atrocities committed during a mostly civil war, an internal conflict occurring within the borders of a nation-state. Although the conflict took on international aspects at various times and was deemed to be a threat to international peace and security, this conflict was mostly internal, domestic. Likewise, the International Criminal Tribunal for Rwanda, using the ICTY as precedent, was created less than two years later in response to the genocide of approximately one million men, women and children who did not share the political ideology or ethnicity of the empowered military regime. This, too, was primarily an internal conflict, a civil war.

¹⁷⁸ Buergenthal, *The Human Rights Revolution*, *supra* note 2, at 10.

¹⁷⁹ *Id.* at 3.

¹⁸⁰ Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 501-502 (1996). The author was assigned as the Legal Advisor, Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia and Rwanda, The Hague, at the time this article was published.

This section will describe the background behind the conflicts in the former Yugoslavia and Rwanda, the International Criminal Tribunals of each and analyze the effectiveness of the Tribunals. Section V, *infra*, will specifically address whether similar actions would be appropriate in resolving the genocide in Iraq.

A. The Former Yugoslavia

1. Background. Tracing its ancient history, this area was inhabited by man's earliest ancestors during the Paleolithic period (ca. 200,000 - 8000 B.C.) and up through modern times it was an area where trade flourished. The inhabitants made and used tools, grew crops, raised livestock, built simple mud and wood homes, and created simple textiles. They traded with the Greeks, were part of Alexander the Great's Macedonia, were conquered by Celts, Romans, Byzantines, Turks, Austrians, Hungarians, French, Germans, and were dominated by Russians. As early as A.D. 14, however, the rift between ethnic, religious and geographic groups had already begun.

Rome had subjugated the Celts in what is now Serbia. The Romans brought order to the region . . . [but their] most significant legacy to the region was the separation of the empire's Byzantine and Roman spheres (Eastern and Western Roman Empires, respectively), which created a cultural chasm that would divide East from West, Eastern Orthodox from Roman Catholic, and Serb from Croat and Slovene.¹⁸¹

Yugoslavia was characterized by states that had very independent histories. Some had periods of independence, most suffered from domination. "The Slovians struggled to defend their cultural identity for a millennium, first under the Frankish Kingdom and then under the Austrian Empire." The Croats had some periods of independence but were eventually dominated by a number of different rulers. The Serbs suffered under the Turkish rule. The Montenegrins were mostly independent and the Bosnians converted to Islam to stay in favor with the Turks who had invaded them. After the Balkan wars, Yugoslavia became its own nation.¹⁸²

By 1990, Yugoslavia was characterized by "distrust across ethnic lines. . . . The deepest and oldest national rivalry . . . was between the Serbs and Croats . . ."¹⁸³ There are two sayings that epitomize their differences. "The first says: 'The very way of life of a Serb and Croat is a deliberate provocation by each to the other.' The second, a self-complimentary Serbian stereotype, holds that in a conflict with authority the Serb reaches for the sword and the Croat for his

¹⁸¹ LIBRARY OF CONGRESS, AREA HANDBOOK SERIES , YUGOSLAVIA, "Pre-Slav History", at 1 <[http://lcweb2.loc.gov/cgi-bin...@field\(DOCID+yu0013](http://lcweb2.loc.gov/cgi-bin...@field(DOCID+yu0013)>.

¹⁸² *Id.* at yu0014, "Histories of the Yugoslav Peoples to World War I," at 1.

¹⁸³ *Id.* at yu0051, "The Yugoslav Nations," at 1.

pen."¹⁸⁴ Yugoslavia disintegrated shortly after the breakup of the Soviet Union, into a new Federal Republic of Yugoslavia (encompassing Serbia and Montenegro) and other independent nations: Bosnia and Herzegovina, Croatia, Albania, and Macedonia.

Bosnia and Herzegovina borders Croatia, Serbia, Montenegro, and the Adriatic Sea. The population is estimated to be ethnically divided as follows: 40% Serb, 38% Muslim, and 22% Croat.¹⁸⁵ The tension in the former Yugoslavia culminated into armed conflict of a serious nature by as early as 25 September 1991.¹⁸⁶ In April 1992, the government of Bosnia and Herzegovina declared its independence from the former Yugoslavia. The Bosnian Serbs, with the support of Serbia and Montenegro began a campaign of "armed resistance aimed at partitioning the republic along ethnic lines and joining Serb-held areas to form a 'greater Serbia.'"¹⁸⁷ When the Serbs began the armed conflict, it initially resulted in a three-way war between the Bosnian Serbs, Muslims and Croats. In 1994, the Bosnian Muslims and Croats resolved their differences and joined to form the Federation of Bosnia and Herzegovina. The government for the Republic of Bosnia and Herzegovina has been recognized as a sovereign nation with two entities: the Federation of Bosnia and Herzegovina and the Bosnian Serb Republic of Srpska.¹⁸⁸

2. *Creation of the Tribunal.* When the UN became aware of the fighting in the former Yugoslavia and Croatia in 1991, the Security Council and other organizations tried to help negotiate peace. The Council expressed concern and imposed an arms embargo.¹⁸⁹ It was not until 1992 that it became aware of the widespread human rights violations. Numerous countries and non-governmental organizations [hereinafter NGO's] reported atrocities and brutal reprisals amongst the warring parties.¹⁹⁰ The public was incensed.

Beginning in May 1992, the Serb forces attacked the Bosnian Muslim and Croat population centers in the opstina of Prijedor, Bosnia and Herzegovina, forcing Muslims and Croats from their homes, confining many thousands who would later be killed, tortured, raped, and cruelly maltreated by the Bosnian Serbs.¹⁹¹ The fighting continued for over three years. During that time, as already indicated, violations of international humanitarian law were rampant and threatened the post-Cold War "hopes for a comfortable peace, at least in Europe

¹⁸⁴ *Id.*

¹⁸⁵ *The World Factbook*, "Bosnia and Herzegovina," at 1 (1997) [hereinafter *World Factbook*]. <<http://www.odl.gov/cia/publications/hsolo/factbook/bk.htm>>

¹⁸⁶ *Prosecutor v. Tadic*, Case IT-94-1-T (Opinion and Judgement) § VI.A.1 (7 May 1997).

¹⁸⁷ *The World Factbook*, *supra*, note 187, at 1.

¹⁸⁸ *Id.* at 1-3. See also, U.S. Department of State Country Report for Bosnia and Herzegovina at 1. <http://www.state.gov/www/global/hu...ghts/1997_hrp_report/bosniahe.html>

¹⁸⁹ S.C. Res 713 (25 Sep. 1991)

¹⁹⁰ James C. O'Brien, *Current Developments, The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 A.J.I.L. 639, 640 (1993).

¹⁹¹ *Prosecutor v. Tadic*, Case IT-94-1-T (Indictment) § 1 - 2.6 (Feb. 1995).

. . . [and] spark[ed] a strong international response. Daily media reports of atrocities - including the abuse of women, inhumane detention facilities, indiscriminate targeting of defenseless civilians, forced expulsions and deportations, and the obstruction of relief convoys have maintained a high level of public outrage."¹⁹²

The Security Council responded incrementally. In July 1992, it confirmed that the parties were obliged to obey the Geneva Conventions and declared that violators would be held individually responsible.¹⁹³ By month's end, the Council decided to publicize the reports of atrocities.¹⁹⁴ The next month the Council expressed "grave alarm" at the human rights violations reported when it adopted Resolution 771.¹⁹⁵ It listed the specific violations including "mass forcible expulsion and deportation, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding delivery of food and medical supplies . . . and wanton destruction of property." The Council demanded that the parties stop "breaching international law."¹⁹⁶ The Council requested the assistance of other Nations to help investigate and finally warned the parties that it was prepared to take further measures under Chapter VII of the UN Charter if they failed to comply.¹⁹⁷

Before any States had submitted reports, the Council requested the UN Secretary General "establish an impartial Commission of Experts" to investigate the allegations.¹⁹⁸ It was hoped that such a Commission akin to the Nuremberg War Crimes Commission and the first of its kind since Nuremberg, would not only provide substantiation of the violations, but also possibly deter additional abuses. In fact, "some humanitarian organizations reported increased access" to prisoners immediately after the request to establish the Commission was made known to the parties.¹⁹⁹ On 26 October 1992, the Secretary General established the Commission and appointed the members.²⁰⁰ In an interim report issued on 9 February 1993, the Commission corroborated that the violations of international humanitarian law had been committed in the territory of the former Yugoslavia including wilful killing, ethnic cleansing, mass killing, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests. It recommended creation of an *ad hoc* international tribunal and the Security Council complied with Resolution 808.²⁰¹

¹⁹² O'Brien, *supra* note 193, at 639.

¹⁹³ S.C. Res 764 (13 Jul 1992).

¹⁹⁴ O'Brien, *supra* note 193, at 641.

¹⁹⁵ S.C. Res 771 (13 Aug 1992).

¹⁹⁶ UN Secretary General Report issued pursuant to S.C. Res. 808 (3 May 1993), 6. [hereinafter Sec.Gen.Rep.].

¹⁹⁷ S.C. Res. 771 (13 Aug. 1992)..

¹⁹⁸ Sec.Gen.Rep. *supra* note 199, § 7.

¹⁹⁹ O'Brien, *supra* note 193, at 641.

²⁰⁰ Sec.Gen.Rep. *supra* note 199, § 8.

²⁰¹ *Id.* at § 9-10.

In Resolution 808, the Council concluded that it would establish a tribunal to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.²⁰² As requested by the Council, the Secretary General issued a written report on 3 May 1993 and included a draft Statute for the creation of an international tribunal.²⁰³ The Council unanimously adopted Resolution 827 on 25 May 1993 which approved the Secretary General Report, established the ICTY, and adopted the proposed Statute of the ICTY [hereinafter Statute] in its entirety and without modification. All States were required to cooperate with these measures.²⁰⁴

The incremental measures - condemning, publicizing, and investigating - had failed to stop the atrocities or make any headway towards peaceful resolution of the dispute.²⁰⁵ The purpose in establishing the ICTY was to end the atrocities, justly punish those people individually responsible and restore peace to the region.²⁰⁶ By all accounts, the Council had exhausted its available remedies before pursuing Chapter VII measures. Quite frankly, the Council would have been justified using force to compel the warring parties to cease and desist. It was under the "all other necessary measures" section of Chapter VII, Article 42, that the Council justified the more peaceful, judicial approach. That is the same provision that has justified UN use of armed force, for example, as it did against Iraq for its invasion of Kuwait.²⁰⁷ The argument supporting its creation is best summarized as follows:

The Council has the authority under chapter VII to take measures to maintain international peace and security. The council may suspend commerce between states or authorize the start of hostilities; it would be odd if it could not take the lesser, surgical step of ameliorating a threat to international peace and security by providing for the prosecution of individuals who violate well-established international law. Moreover, the threat to international peace and security at issue violations of international humanitarian law is best addressed by a judicial remedy. Indeed, international humanitarian law itself specifies that violations are to be redressed in accordance with due process. Those states urging consensual measures in fact endorsed Resolution 827²⁰⁸

²⁰² S.C. Res. 808, § 1 (22 Feb. 1993).

²⁰³ *Id.* Annex, at 36.

²⁰⁴ S.C. Res. 827 (25 May 1993). See also, UN CHARTER, Art. 43 and 48.

²⁰⁵ O'Brien, *supra* note 193, at 641. See also Sec.Gen.Rep. *supra* note 198, § 10.

²⁰⁶ Sec.Gen.Rep. *supra* note 199, § 10 - 13.

²⁰⁷ S.C. Res. 687 (1991). See also Sec.Gen.Rep. *supra* note 199, § 27.

²⁰⁸ O'Brien, *supra* note 193, at 643

Public outrage forced international response. The atrocities were crimes regardless of any domestic law and as will be seen *infra*, the offenses were primarily defined by customary international humanitarian law.

By creating the ICTY, the world-community is agreeing that there are certain minimum rights of all human beings. The world is overriding domestic sovereignty with this Tribunal. The common unity may not be able to agree on all of the rights inherent to all human beings, but in the ICTY, it is agreeing that these rights should include no murder, torture, cruelty to anyone, or rape. Violations will not be tolerated, they will not be ignored and the circumstances demand justice. Those accused will get due process, more than most gave their victims, and needless loss of life will not be met with more loss of life because the punishment authorized does not include the death penalty.²⁰⁹

In conclusion, "[t]he tribunal is a reasoned response to the atrocities in the former Yugoslavia, and the Security Council's decision in establishing it set forth a reasonable model for approaching violations of international humanitarian law in the future. When atrocities themselves constitute threats to international peace and security, and when alternatives have been exhausted by the Security Council, the Council may act to enforce individual responsibility directly."²¹⁰ The Secretary General defined the details by which cases would be adjudicated in its Report and implementing Statute. It explained the ICTY's legal basis, jurisdictional parameters, organization, investigation and other pre-trial procedures, trial and post-trial proceedings, requirement for all States to cooperate and other miscellaneous provisions.²¹¹

²⁰⁹ Statute, Art. 24. See also O'Brien, *supra* note 193, at 658.

²¹⁰ O'Brien, *supra* note 193, at 658.

²¹¹ Sec.Gen.Rep. *supra* note 199, § 18-138.

The ICTY's legal basis is established in the Council's powers under Chapter VII of the UN Charter. The judicial approach was determined to be a reasonable use of the Council's mandate to "maintain and restore international peace and security."²¹² Creating a subsidiary organ of the UN is generally authorized under Article 29.²¹³ The tribunal approach created by the Council was seen to be not only authorized, but also a more effective and expeditious method than a treaty process, or other methods may have been.²¹⁴ The situation of widespread atrocities was in urgent need of reconciliation. Furthermore, the effectiveness would be enhanced by the requirement under the UN Charter, Article 43, that all States shall cooperate with enforcement measures taken under Chapter VII.²¹⁵ Such cooperation is unlikely under other alternatives to a tribunal. Finally, the parties knew they were obliged to comply with international humanitarian law and that failure to do so could trigger Council action under Chapter VII.²¹⁶ Given the valid object and purpose of the Statute - ending atrocities, bringing responsible parties to justice, and restoring and maintaining international peace - and the other justifications listed, the legal basis was clearly established.

Although the competence of the ICTY was later challenged in the Appeal of the ICTY's first case, the Statute which established the Tribunal's competence described its jurisdiction in several areas. First, the Statute determined that the ICTY has subject-matter jurisdiction over violations of conventional international law that were beyond any doubt part of customary international humanitarian law. This was to avoid the issue of whether certain States were parties to all the relevant conventions. Those conventions included, "[T]he Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Conventions Respecting the Laws and Customs of War on Land . . . of 18 October 1907; the Convention on the Prevention and Punishment . . . of Genocide of 9 December 1948, and the Charter of the International Military Tribunal of 8 August 1945."²¹⁷

The specific offenses were described next. Article 2 of the Statute lists the "Grave Breaches" of the Geneva Convention. A few of those crimes are wilful killing, torture, and unlawful confinement of civilians. Article 3 describes the Hague Convention Customs of War offenses. These violations include using weapons that cause unnecessary suffering, devastation not justified by military necessity, attacking undefended towns and others. Article 4 covers Genocide, "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group," it includes killing, preventing births, causing serious mental or bodily harm and others. "Crimes against Humanity" first recognized in the Charter and Judgement of the Nuremberg Tribunal were covered in Article

²¹² UN CHARTER, Art. 39 & 42.

²¹³ *Id.* Art. 29. See also Sec.Gen.Rep. *supra* note 199, § 28.

²¹⁴ Sec.Gen.Rep., *supra* note 199, § 19-25.

²¹⁵ *Id.* § 21.

²¹⁶ S.C. Res. 771 (13 Aug. 1992).

²¹⁷ Sec.Gen.Rep., *supra* note 199, § 35.

5. The crimes included murder, torture or rape, "committed as part of a widespread or systemic attack against a civilian populations" on the grounds listed previously. Article 5 not only lists the offenses, but specifically noted that these crimes may be committed in either internal or international armed conflict.²¹⁸

Second, personal jurisdiction is defined in Article 7 of the Statute. Only natural persons, vice associations or states, are covered. Individual responsibility lies with the person who "instigated, ordered, committed or aided and abetted in the planning, preparation or execution" of crimes described in Article 2 through 5 of the Statute.²¹⁹ There is no Head of State immunity and in fact, failure to prevent or deter unlawful behavior shall impute criminal liability to superiors who know or should have known subordinates were committing the listed offenses.²²⁰

Additionally, there is no defense of obedience to superior or Government orders, however, it "may be considered in mitigation of punishment" at the discretion of the Tribunal.²²¹

Finally, the Council did not intend to preclude jurisdiction of national courts, so concurrent jurisdiction exists. The ICTY has primacy jurisdiction over the national courts.²²² Under the principle of *non-bis-in-idem*, persons are not to be tried twice for the same crime. As applied here, the national court may not try defendants after the Tribunal for violations of international humanitarian law, nor may the Tribunal prosecute persons after the national court unless the domestic court only prosecuted for ordinary crimes or the proceedings were not impartial or were intended to shield the accused from the Tribunal.²²³

In answering the validity of the Council's creation of the ICTY issue, the Appeals Chamber explained that it was well within the Council's powers under Chapter VII. The Council has broad discretion because Article 39 of the UN Charter permits the Council to choose its means of restoring and maintaining peace. The existence of a threat to peace can be established by there being an international or internal armed conflict, depending on the circumstances. Examples of these types of conflicts described by the Chamber included the Congo, Liberia, and Somalia. Nothing in the UN Charter prohibits establishing a judicial organ.²²⁴ Finally, the Statute of the ICTY provided necessary safeguards for a fair trial, and in fact, the fair trial guarantees in Article 14 of the ICCPR have been adopted almost verbatim in Article 21 of the Statute.²²⁵ The Appeal Chamber found that the ICTY was legally and validly established under the UN Charter. The Chamber held:

²¹⁸ Statute of the International Tribunal, Art. 2-5 (25 May 1993).

²¹⁹ *Id.* Art. 7, § 1.

²²⁰ *Id.* § 2 - 3. See also Sec.Gen.Rep., *supra* note 199, 55 - 56.

²²¹ Statute, Art. 7, § 4.

²²² *Id.* Art. 9.

²²³ *Id.* Art. 10.

²²⁴ Prosecutor v. Tadic, Case IT-94-AR72, Appeal on Jurisdiction, § 30 - 35 (2 October 1995), reproduced at 16 HUM. RTS. L. J. 437 (1995).

²²⁵ *Id.* § 46.

[T]he public revulsion against similar offenses [referring to Nazi war crimes] is what led to the creation of an international judicial body by an organ of an organization representing the community of nations It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who would trample underfoot the most elementary rights of humanity.²²⁶

The decision of the Appeals Chamber has been criticized in that it "complicates unnecessarily the further work of the Tribunal" because now each case will have to resolve the nature of the armed conflict for some offenses. On the other hand, the rulings are praised because, "the decision stands as an important judicial affirmation that serious violations of international humanitarian law committed in non-international armed conflicts are international crimes."²²⁷

In fact, the Appeal Chamber stated that, "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict."²²⁸ The Appeal Chamber opined that an armed conflict would not even have been required had the Statute not inserted the phrase into that section "when committed in armed conflict, whether international or internal . . . directed against any civilian populations."²²⁹ This requirement for an armed conflict is omitted in the Rwanda International Criminal Tribunal Statute.²³⁰

3. Effectiveness of ICTY. To what extent, if any, has the Tribunal operated to meet its goals of ending the atrocities, restoring and maintaining peace, and bringing those responsible to justice? At the end of 1997, 78 people had been indicted; 2 people tried and convicted [Dule Tadic and Drazen Erdemovic²³¹]; and 21 others were in custody awaiting trial.²³² On 8 April 1998, two more suspects were arrested by British special forces, Miroslav Kvocka and Mladen Radic. Both men were allegedly involved in atrocities in the Omarska

²²⁶ *Id.* § 58.

²²⁷ George H. Aldrich, *Jurisdiction of the International Criminal Tribunal for the former Yugoslavia*, 90 AM. J. INT'L L. 64, 68 - 69.

²²⁸ Prosecutor v. Tadic, Case IT-94-AR72, Appeal on Jurisdiction, § 141 (2 October 1995), reproduced at 16 HUM. RTS. L. J. 437 (1995).

²²⁹ *Id.* § 138 - 140.

²³⁰ S.C. Res. 955 (8 November 1994).

²³¹ The first defendant sentenced by the ICTY was Drazen Erdemovic. He received a 10 year term for his role in the mass executions of Muslims from Srebrenica. He pled guilty and later testified in hearings against Karadzic and Mladic. See Prosecutor v. Erdemovic, Case IT-96-22-T (31 May 1996).

²³² U. S. Department of State Country Report for Bosnia and Herzegovina, at 4 (Library of Congress 1997). < http://www.state.gov...1997_hrp_report/bosniahe.html > See also ICTY Trial Chambers < <http://www.un.org.icty> >.

camp, the same camp where Tadic committed his crimes.²³³

One author criticized early in the ICTY's history that some of the political and military leaders were the same personnel involved in negotiating the peace. He questioned whether the public desire to prosecute the guilty might interfere with securing peace or prolonging the atrocities.²³⁴ Well, the Dayton Peace Accords were signed on 21 November 1995. Of note, although a year later not all the parties had fully complied with their responsibilities under the agreement, they did "implicitly recognize the Tribunal as necessary to the restoration of peace and security in the former Yugoslavia . . . [It] is an indication of the significance and independence of the Tribunal has acquired in its [four] years of existence."²³⁵

The *Karadzic* and *Mladic* cases raised interesting enforcement issues. These men were the self-declared president of the Bosnian-Serb administration and commander of its army, respectively. They are still at large.²³⁶ While avoiding the trial *in absentia* prohibition of the Statute, the ICTY held a Rule 61 proceeding. In this situation, the prosecutor presents evidence in open court in support of the indictment. If the Trial Chamber agrees that there are "reasonable grounds for believing that the accused has committed all or any of the crimes charge[d] . . . [then the Chamber] must issue an international arrest warrant . . ."²³⁷ In July 1996, international arrest warrants were issued for the arrest of both individuals.

[T]he tribunal's legitimacy will depend on whether it is seen as an appropriate response to the Yugoslav situation. It should be of interest to international lawyers that the legal characteristics of the Council's response - that the atrocities themselves constitute threats to international peace and security and that alternative remedies were exhausted - are central to legitimacy. . . . [T]he legal steps taken remain a pattern for future action by the Security Council, a model for responses to violations of international humanitarian law that can protect state sovereignty while reinforcing the protection of individuals under that law.²³⁸

In a broader sense, the Tribunal's effectiveness can be measured in many ways. First, the Republic of Bosnia and Herzegovina is a separate state, independent of Yugoslavia. As a result of the Dayton Accords, Bosnia and

²³³ See Colin Soloway, *Bosnian War Crimes Suspects Arrested*, WASHINGTON POST, April 9, 1998, at A27.

²³⁴ Anthony D'Amato, *Editorial Comment: Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 500, 500 - 502 (1994).

²³⁵ Douglas Stringer and Diane Marie Amann, *International Criminal Law, International Criminal Tribunal for the Former Yugoslavia*, 31 INT'L LAW, 611, 614 (Summer 1997).

²³⁶ Prosecutor v. Erdemovic, Case IT-96-22-T (31 May 1996).

²³⁷ Stringer and Amann, *supra* note 238, at 614 - 619 citing Rule 61(A) - (D).

²³⁸ O'Brien, *supra* note 193, at 644.

Herzegovina divided internally into the Federation of Bosnia and Herzegovina, which has a majority of Muslims and Croats and 51% of the nation's land; and into the Republic of Srpska, which is home to the Bosnian Serb majority and possesses 49% of the land territory. The new government has a "three member presidency" with representatives from each of the major ethnic groups.²³⁹

Next, the new republic held national elections in September 1997 and over 70% of those eligible voted.²⁴⁰ Srpska has had more troubles with its elections, mostly involving "physical intimidation," but given that the hard-line Serbs lost its majority in parliament at those elections, those in power are confident that the situation will improve.²⁴¹ Another issue both entities continue to struggle with is discrimination, especially abuse by police officers and retaliation against Bosnian Serb "returnees." It is hoped that the police training on human rights and proper procedures which is scheduled for 1998 will help improve matters.²⁴²

Economically, unemployment has decreased from 90% to 50%, wages and the GDP have both increased, especially in the Federation. Overall, there is improvement in freedom of movement and less violence against women.²⁴³ The next national elections are scheduled for September 1998. On the negative side, prison conditions are horrid; the judiciary lacks independence and suffers from intimidation; ethnic discrimination is considered severe; many atrocities have gone unpunished; and the mobs are prone to violence.²⁴⁴ On a mixed review, the freedom of speech and of the press have improved a little but still lack the complete freedom needed to preserve a democratic and free society.²⁴⁵

Finally, the European Union and the United States have undertaken a pledge to the successful promotion of "human rights and democratization in Bosnia and Herzegovina with a view to the period ending with the 1998 national elections," in the Joint Statement released on December 5, 1997. The two parties met in a special summit to make their pledge to specific objectives aimed at accomplishing a number of goals, including: efficiently adjudicating the cases against those responsible for war crimes; monitoring elections; providing economic development support; helping support a free and independent media; reforming the legal system, including property laws; and assisting the International Police Task Force in its efforts to reform the local police forces.²⁴⁶

²³⁹ U.S. Department of State, 1997 Human Rights Report Bosnia and Herzegovina, at 1. <http://www.state.gov/www/global/hu...ghts/1997_hrp_report/bosniahe.html>.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 2.

²⁴² *Id.* 2 - 3.

²⁴³ *Id.* at 2 - 13.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 3 and 8 - 9.

²⁴⁶ Human Rights and Democratization Priorities in Bosnia and Herzegovina, Joint Statement released in conjunction with the U.S. - EU Summit, Washington, DC, December 5, 1997, at 1 - 5. <http://www.state.gov/www/regions/our/Eu/971205_useu_bosnia_hr.html>

B. Rwanda

1. **Background.** Although Rwanda is a country with grasslands and small farms extending over rolling hills, with areas of rugged mountains having elevations up to an average of 9000 feet,²⁴⁷ it is also one of the two poorest countries in the world.²⁴⁸ Rwanda is located in the central part of Africa, landlocked between Zaire, Uganda, Tanzania and Burundi.²⁴⁹ The temperate climate is especially suited for agricultural production, which has included coffee and tea. They have had a modest mineral production enterprise.²⁵⁰

Rwanda's earliest inhabitants were the *Twa* peoples who were hunter-gatherers. Today, they comprise about 1% of the population. Hutus comprise the majority of the population at 84%; their origins are most likely that of the Bantu people, early European settlers who were primarily agriculturalists. The Tutsis came last. They comprise about 15% of the total population and were primarily pastoralists. Some historians indicate that the Tutsis were foreign invaders. Due to the high mountains, Rwanda had avoided the exploitation by slave traders.²⁵¹

The civil war that culminated here in the 1994 genocide campaign has its roots in the centuries old rivalry between the Hutus and the Tutsis:

According to folklore, Tutsi cattle breeders began arriving in the area from the horn of Africa in the 15th century and gradually subjugated the Hutu inhabitants. The Tutsis established a monarchy headed by a *mwami* (king) and a feudal hierarchy of Tutsi nobles and gentry. Through a contract known as *ubuhake*, the Hutu farmers pledged their services and those of their descendants to a Tutsi lord in return for the loan of cattle and use of pastures and arable land. Thus, the Tutsi reduced the Hutu to virtual serfdom.²⁵² [Italics added.]

European influence and dominance began in 1894 with the arrival of the Germans. The Belgians, already in neighboring Zaire, took control in 1915. They maintained political preeminence under the League of Nations mandate system and later the UN Trusteeship was awarded them, until 1962.²⁵³ The ethnic

²⁴⁷ U.S. Department of State, Background Notes: Rwanda, at 2 (June 1996). [hereinafter Background Notes: Rwanda] <<http://www.state.gov>>.

²⁴⁸ Robert F. Van Lierop, *Mission Report, Rwanda Evaluation: Report and Recommendations*, 31 INT'L LAW. 887, at 895 (Fall 1997). Mr. Van Lierop is the former chair of the Special Committee on African Affairs of the Association of the Bar of the City of New York. He is also the co-chair of the African Law Committee of the ABA Section of International law and Practice.

²⁴⁹ *The World Fact book*, "Rwanda" at 1.

<<http://www.odci.gov/cia/publications/nsolo/factbook/rw.htm>> visited 10 March 1998.

²⁵⁰ Background Notes: Rwanda, *supra* note 250, at 2 and 6.

²⁵¹ Van Lierop, *supra* note 251, at 890 - 891.

²⁵² Background Notes: Rwanda, *supra* note 250, at 3.

²⁵³ *Id.*

gap seemed to grow during the colonial rule because the colonizers seemed to favor the Tutsi aristocracy of old - until they tried to assert political independence. At that point, the support shifted to the Hutu "nationalist movement" which was struggling to overcome Tutsi "political domination."²⁵⁴ During this period, the minority group, Tutsis exercised significant local power, sponsored by the Belgians, at the expense of the Hutus, the majority population. When Rwanda became independent in 1962, the Hutus ruled and the Tutsis alternated between fleeing into exile into neighboring Burundi, Uganda or Tanzania, and sporadic inter-tribal violence. From 1962 until 1973, the Hutu controlled Rwandan government was oppressive and crooked. "[I]nefficiency and corruption began festering in . . . the mid-1960's" and in 1973, after a bloodless coup, the military established a dictatorship under President (and former Major General) Juvénal Habyarimana.²⁵⁵

Juvénal Habyarimana was a former Major General in the Rwandan military. He "seized power in a coup état in 1973 that occurred in the midst of anti-Tutsi violence he was suspected of orchestrating."²⁵⁶ His regime was considered despotic and encouraged the "crudest forms of ethnicity, . . . he was corrupt and morally bankrupt."²⁵⁷ Despite the fact that President Habyarimana was initiating government reforms including expanding the state into a multiparty system, civil war began in 1990. The war began as a result of an all-out invasion by the displaced Tutsis who had been hiding out across the border in Uganda. The fighting continued over several years, until a peace treaty was signed in August 1993.

As progress was being made to truly resolve the issues involved in the civil war, the militant faction of the Hutu militia, *iterahamwe*, was becoming disenchanted. Then, on April 6th, the President's plane crashed, killing both he and the President of Burundi. The Presidents had been attending a peace summit "in Tanzania where, under severe international pressure, Habyarimana had finally agreed to honor power-sharing agreement to bring peace to Rwanda."²⁵⁸ Some evidence indicated that his own troops had shot down the plane. Immediately after the incident, the Prime Minister and President of the Constitutional Court were "brutally murdered by members of the Presidential Guard. . . . Both were Hutus."²⁵⁹

What followed next was a Hutu initiated genocide of the Tutsis and moderate Hutus supportive of the reconciliation.²⁶⁰ Estimates are that up to one million people - men, women and children were murdered by the Hutu militia between April 6th and early July 1994.

²⁵⁴ Van Lierop, *supra* note 251, at 891.

²⁵⁵ Background Notes: Rwanda, *supra* note 250, at 2 - 3.

²⁵⁶ Van Lierop, *supra* note 251, at 890.

²⁵⁷ *Id.* at 890 - 891.

²⁵⁸ *Id.* at 893.

²⁵⁹ *Id.*

²⁶⁰ Background Notes: Rwanda, *supra* note 250, at 4.

Tutsis were killed simply because they were Tutsis. . . . There were no sanctuaries. The killers invaded homes, places of business, schools, hospitals, and even churches in search of their prey. The dead and the dying were unceremoniously stripped of their clothing, jewelry, and anything of value. Some were shot or killed by grenades. Most were chopped to death with machetes, knives or farm hoes. Others were thrown down pit latrines, or wells, or were bound and tossed into rivers or down ravines or even buried alive.²⁶¹

Two million other people fled to neighboring countries, severely taxing their resources, and yet another million people had been displaced within Rwanda. Prior to the genocide the total population was approximately 7.5 million people.²⁶²

The world response included tremendous outpouring of humanitarian aid,²⁶³ the creation of a Chapter VI, UN peacekeeping force called UNAMIR, UN Peacekeeping Mission in Rwanda,²⁶⁴ and the creation of the International Criminal Tribunal for Rwanda whose primary purpose was to punish those responsible for the violations of international humanitarian law.²⁶⁵

2. Creation of the ICTR. The ICTR was created after the Security Council reviewed a report from an impartial commission of experts tasked with studying the Rwandan plight. On November 8, 1994, the Council adopted Resolution 955, which created the ICTR. It was a separate and distinct tribunal, mirrored after the ICTY. It was specifically kept separate to avoid expansion of the *ad hoc* tribunal into a permanent international criminal judicial institution.²⁶⁶

A number of reasons were given for the ICTR solution. First, genocide is a crime of all humankind and worthy of international enforcement. Second, having an international tribunal avoids the appearance of vindictive prosecution of the victorious, or "victors justice," a criticism frequently used against the Nurnberg and Tokyo tribunals. Third, the tribunal was seen as a critical prong in the institution of national reconciliation. It was hoped that it would give the survivors confidence that atrocities would not happen again and that those responsible would be justly punished. The ICTR was seen as "an essential element of post-conflict peace building." Finally, it was hoped that the ICTR would make extradition from foreign countries procedurally easier, since many of

²⁶¹ Van Lierop, *supra* note 251, at 892.

²⁶² Background Notes: Rwanda, *supra* note 250, at 1 - 4.

²⁶³ *Id.* at 4.

²⁶⁴ *Id.* at 7.

²⁶⁵ Douglas Stringer, *International Tribunal for Rwanda*, 31 INT'L LAW 621, at 621-622 (Summer 1997). Mr. Stringer is co-chair of the International Criminal Law Committee of the ABA and is a former prosecutor with the U.S. Department of Justice.

²⁶⁶ Akhavan, *supra* note 182 at 502. See also S.C. Res 955 (8 November 1994).

the suspects had fled outside Rwanda's borders.²⁶⁷

In response to "grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda," the Security Council created an International Tribunal to prosecute responsible persons. This occurred by a vote of 13 in favor, 1 against (Rwanda) and 1 abstention (China).²⁶⁸ Ironically, Rwanda did not vote for S.C. Resolution 955, although it was a voting, temporary member of the Security Council at the time and indeed was the main proponent of establishing the ICTR. Its objections to some of the details of the Rwanda Tribunal proved to be unfounded, for the most part.²⁶⁹ Its biggest objections were the lack of the death penalty, which it felt was disparate given that domestically the death penalty was authorized for genocide convictions and the location of the Tribunal seat outside of Rwanda.²⁷⁰

The Security Council responded with the ICTR after considering reports of the Special Rapporteur for Rwanda and the preliminary findings of the specially appointed Commission of Experts, submitted in October 1994.²⁷¹ The ICTR was convened pursuant to the Council's Chapter VII powers, the same as the ICTY. (See previous discussion on creation and legal basis, *supra* at Part IV. A.) The Tribunal's implementing Statute was attached as an Annex to the Resolution.

The ICTR Statute has jurisdiction to prosecute crimes of genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.²⁷² Genocide was defined as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" and the acts listed included killing, harming, destroying the physical surroundings, preventing births, and involuntary transfer of children.²⁷³ Crimes against humanity included: "murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, and other inhumane acts."²⁷⁴ Common Article 3 Offenses entailed: "Violence to life, health, and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment."²⁷⁵

Similar to the ICTY, the crimes to be adjudicated were those recognized

²⁶⁷ *Id.* at 504 - 505.

²⁶⁸ S.C. RES 955, Doc. D/1994/1168, S/RES/955, *reprinted at* 16 HUMAN RTS L. J. 124, at 124 (1995) [hereinafter *ICT Rwanda / Statute*].

²⁶⁹ Akhavan, *supra* note 182, at 506 - 508.

²⁷⁰ *Id.*

²⁷¹ *ICT Rwanda / Statute*, *supra* note 272, at 124.

²⁷² *Id.* at 125, *citing* ICTR Statute Art. 2, 3, and 4.

²⁷³ *Id.* *citing* ICTR Statute Art. 2.

²⁷⁴ *Id.* *citing* ICTR Statute Art. 3.

²⁷⁵ *Id.* *citing* ICTR Statute Art. 4.

as violations of international humanitarian law. Distinctly, the Rwanda Statute did not impose requirements of "international armed conflict" when defining law of war offenses in Article 4 of the Statute. Neither genocide nor crimes against humanity require armed conflict, either internal or international. Thus the criticism for excessive complexity imposed by the *TADIC* Appeals Chamber was overcome.²⁷⁶ Another difference was that subject matter jurisdiction was not restricted to customary law, but expanded to include international instruments binding upon Rwanda.²⁷⁷

Procedurally, the ICTR Statute was nearly identical to that of the ICTY. The Tribunal possessed very finite jurisdiction with regard to territory and time period; it had personal jurisdiction without regard to official leadership status or whether one was following orders; it had primacy over national courts while recognizing *non-bis-in-idem*; it was organized into Trial and Appeals Chambers (sharing the same Appeals Chamber with the ICTY, in fact²⁷⁸); it provided for similar administrative and support staff; and it clearly defined the qualifications for judges, officers of the court and members of the chambers. It established the same rules of procedure, evidence gathering and investigation; it defined extensive rights of the accused and protection for victims. Punishment was limited to imprisonment and returning ill-gotten property. Sentences would be served in Rwanda or in one of the States volunteering to accept those convicted. Finally, it mandated cooperation of all States with the investigation, prosecution and requests for assistance by the ICTR.²⁷⁹

The Security Council required both the ICTY and the ICTR work in cooperation with one another, sharing where possible, "certain organizational and institutional links," so as to ensure a unity with legal approach as well as economy and efficiency of resources."²⁸⁰ Another issue of comparison between the two Tribunals is that the Rwandan government strongly supported establishment of the Tribunal, whereas the entities of the former Yugoslavia basically had the Tribunal solution imposed upon them. As a sitting member of the Security Council, "Rwanda participated fully in the deliberations on the Statute and the negotiations leading to the adoption of Resolution 955. Indeed, Rwanda took the initiative in proposing the establishment of an international tribunal as early as September 1994, before any serious consideration was given to the matter by the other states."²⁸¹ One final note of comparison:

One promising feature of the Rwanda Tribunal is that, unlike those in the former Yugoslavia, the leading Rwandese perpetrators of genocide were defeated militarily, removed from

²⁷⁶ Akhavan, *supra* note 182, at 503 - 504.

²⁷⁷ *Id.* at 504.

²⁷⁸ United Nations Update on UNAMIR, at 1 <<http://www.un.org/pleb/cgi...rwanda>> visited 11 Mar 1998.

²⁷⁹ *ICT for Rwanda / Statute*, *supra* note 272, at 124 - 128, citing Art. 5 - 32.

²⁸⁰ Akhavan, *supra* note 182, at 503, citing Report of the Sec. Gen, Doc. S/1995/134, at 2 - 3, § 9.

²⁸¹ *Id.* at 504.

state institutions and positions of leadership, and are either in refugee camps in neighboring countries or in exile elsewhere.

Accordingly, the prospect of arresting Rwandese suspects is more feasible, although the cooperation of Rwanda and third states such as Zaire is vital and poses some difficulties.²⁸²

3. Effectiveness of ICTR. The ICTR has operated under "significant financial and logistical constraints," including suspicion of internal corruption of a UN official working on the Tribunal staff and "concerns for the safety and security of the ICTR staff and prosecution witnesses."²⁸³ By November 1996, 21 indictments had been issued and 14 of the suspects were in custody awaiting trial.²⁸⁴

Despite budget and logistical challenges of, for example, finding witnesses amongst millions of displaced people in a war-ravaged country, the first indictments were issued within one year of Resolution 955. Those in custody include several of the most senior leaders alleged to have orchestrated the genocide. Georges Rutaganda, former second Vice President of the notorious *Interahamwe* militia is charged with ordering "the killing of Tutsis . . . in Kigali and at . . . [a] school in Kicuriro commune. He is also alleged to have instructed the *Interahamwe* to track all Tutsis and throw them in a river, and . . . [he] ordered people to bury the bodies of victims in order to conceal the crimes from the international community." Most would conclude that he played a leading role in the 1994 genocide.²⁸⁵ Another accused already arrested, is Colonel Theoneste Bagosora, former Director of the Cabinet of the Rwandan Ministry of Defense, is "alleged to be a principle architect of ethnic attacks against the Rwandan Tutsi populations . . . [He is charged] with genocide, crimes against humanity, and serious violations of Common Article 3."²⁸⁶ Pauline Nyiramasuhuko, the former Minister of Social and Family Welfare, is the first woman in history indicted by an international tribunal.²⁸⁷ Akayesu, a former mayor is currently on trial for his alleged participation.²⁸⁸

The effects of the civil war and the true effectiveness of the Tribunal are seen in a number of areas. Approximately 60,000 to 100,000 suspects remain in domestic Rwandan jails without much promise of successful prosecution any time soon. These people are pending national adjudication and are not subjects of the

²⁸² *Id.* at 509.

²⁸³ Stringer, *International Tribunal for Rwanda*, *supra* note 269, at 622.

²⁸⁴ *Id.*

²⁸⁵ International Tribunal for Rwanda, *Trial of Rutaganda Resumes Tomorrow*, AFRICA NEWS ONLINE, at 1 (March 4, 1998) <http://www.africanews.org/east/rwanda/stories/19980304_feat1.html>. See also, Akhavan, *supra* note 182, at 509.

²⁸⁶ Stringer, *International Tribunal for Rwanda*, *supra* note 269, at 622, citing Prosecutor v. Theoneste Bagosora, Case No. ICTR-96-7-1.

²⁸⁷ Agwu Ukiwe Okapi, *UN Genocide Tribunal for Rwanda is Making Progress*, AFRICA NEWS ONLINE, at 1 - 2 (23 Feb 1998) <http://africanews.org/east/rwanda/stories/19980223_feat6.html>.

²⁸⁸ *Id.*

ICTR. Adding to the prison challenges is the fact that only 5% of the national judges and lawyers are still in Rwanda since the war.

The biggest problem[s] facing the government [are] rehabilitation of war damage, reintegration of refugees returning from as long ago as 1959, and attracting back the more than one million refugees camped on the borders with Tanzania, Burundi, and most notably, Zaire. One problem of particular urgency is the prison population, which swelled to 66,000 two years after the war. Trying this many suspects of genocide will tax Rwanda's resources sorely.²⁸⁹

Other sources indicated that as of fall 1997, the prison population was over 100,000 people suspected of participating in the genocide.²⁹⁰ Contrary to that dismal report, however, some third countries may prosecute "arrested suspects, based upon the universality principle of jurisdiction, which clearly applies to offenses such as crimes against humanity and genocide."²⁹¹

Along those lines, the U.S. and the ICTR entered into a subsequent treaty guaranteeing U.S. cooperation with the Tribunal's prosecution efforts and promised to surrender suspects or persons convicted by the ICTR and spelled out various procedures for implementing same. The Treaty included an understanding of the Tribunal's obligation to preserve the "unconditional confidentiality" of information provided by sovereign nations on a confidential basis, even those that information was only used to generate other new evidence.²⁹²

Rwanda will continue to have a genuine problem and incapacity to punish all the perpetrators and vindicate all the victims. "[N]o judicial system anywhere in the world, has been designed to cope with the requirements of prosecuting genocide. Criminal justice systems . . . are unsuited for crimes committed by tens of thousands against hundreds of thousands."²⁹³ Not even the sophisticated criminal justice system of Europe was prepared to adjudicate the cases of tens of thousands of perpetrators after World War II; it is unseemly to imagine that impoverished and undeveloped Rwanda could do so. Rwanda does not and cannot even provide each accused with qualified defense counsel. Its witnesses are at constant risk for their personal safety; the judiciary has been intimidated; and "genocindaires" have continued some attacks to finish the what they started.²⁹⁴

²⁸⁹ Background Notes: Rwanda, *supra* note 250, at 5.

²⁹⁰ Van Lierop, *supra* note 251, at 894.

²⁹¹ Akhavan, *supra* note 182, at 510.

²⁹² Agreement on Surrender of persons between the Government of the United States and the International Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other Such Violations Committed in the Territory of Neighboring States, entered into force February 14, 1996, available in 1996 WL 165484 (Treaty).

²⁹³ Van Lierop, *supra* note 251, at 895 - 895, quoting Professor William Schabas, *Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, at 8.

²⁹⁴ *Id.* at 898 - 901.

Criticism on the effectiveness of the ICTR covers a number of subjects. First, the lead Prosecutor spends too little time in Africa, diminishing the Tribunal's effectiveness. The argument is that certainly, given the scope of the cases, the people deserve a full-time prosecutor, working close-by. Second, absent a death penalty at the ICTR, the ringleaders will only serve jail time while the subordinates will likely face execution, if convicted domestically of genocide. Next, the ICTR has not been very cooperative with the local Rwandan judicial system, thereby depriving it of the enhanced development it was promised. The ICTR seems more interested in the broad international consequences and support for its permanent criminal court than rebuilding (or building) the Rwandan justice system and proving to the public that indeed, justice is being done. Finally, the witness protection program is inadequate.²⁹⁵

As for concrete actions by US attorneys to help Rwanda, the author cited above, Mr. Van Lierop, recommends the American Bar Association support civil litigation against any of the genocide participants found within US jurisdiction and discourages criminal litigation to avoid any risks with denial for ICTR primacy.²⁹⁶

The effectiveness of the ICTR cannot be discussed in a vacuum. Rwanda faces innumerable challenges post-genocide. Rwanda is trying to reintegrate victims and survivors after the genocide - unprecedented. "Rarely in human history has a society asked insisted that all its people live together again, side by side, in the aftermath of genocide. . . . The people of Rwanda are attempting to do what few societies in recorded history have ever done."²⁹⁷ Another challenge is the group of extremists that have continued to commit genocide in the northwest sector. Third, the prisons hold over 2000 children accused of genocide participation, along with over 100,000 others. In some ways, it is amazing that the prisoners are in jail and were not summarily executed - consistent with past practices in Rwanda before 1994. Many children are acting as heads of households, although attempts are being made to locate adult relatives. Lastly, the

²⁹⁵ *Id.* at 901 - 903.

²⁹⁶ *Id.* 906.

²⁹⁷ Jeff Drumtra, *Life After Death: Suspicion and Reintegration in Post-Genocide Rwanda*, Part 1, at 4, reprinted in part Africa News Online, <http://www.africanews.org/east/rwanda/stories/19980303_feat1.html>. Mr. Drumtra is an Africa Policy Analyst. The author cites the creation of Armenia and Israel and the basic separation into ethnic states in Bosnia as examples of the separation vice reintegration of affected parties.

problem of refugees is seemingly insurmountable.²⁹⁸

All criticism aside, one must query whether Rwanda is better off because of the Tribunal and the answer is a definite, yes. Is it a cure-all? Of course not, but it is certainly more palatable to the world to punish those leaders who orchestrated the atrocities and created an atmosphere of horror for the innocent and then continue to try to develop the method toward national reconciliation and peace.

V. WHAT DO TO ABOUT THE KURDS?

²⁹⁸*Id.*, at 5 - 6.

Few civilized peoples or governments would refute the premise that the Kurds like the Tutsis and Hutus murdered with machetes and garden hoes, like the Croats and Bosnian Muslims that were tortured, raped, and mutilated *en masse*, and like the millions of Jews exterminated in the Nazi gas chambers - deserve justice. As human beings, they are vested in certain inalienable rights. The Kurds share the human birthright to life and dignity.²⁹⁹

A number of options exist by which to adjudicate the Kurdish atrocities. The UN might pursue several avenues of redress; the Security Council could take peaceful or forceful action, including convening an *ad hoc* International Criminal Tribunal for Iraq [hereinafter ICTI]; States or NGO's may file complaints; individuals might pursue civil or criminal rulings; the mandate of the Special Rapporteur might be expanded; the circumstances might justify granting the Kurds the long sought self-determination; or the world might use these circumstances, combined with the recent challenges of *ad hoc* tribunal enforcement to justify the creation of a permanent international criminal court. Saddam Hussein and Ali Hassan al-Majid could be the first defendants.

A. UN Actions Generally

1. *Suspend or expel Iraq's membership in the UN.* The UN in its creation determined that it would "save succeeding generations from the scourge of war and reaffirm[ed its] faith in fundamental human rights, in the dignity and worth of the human person . . ."³⁰⁰ That same Charter and subsequent UN enactments provide a variety of options, the most severe of which would be to suspend or expel Iraq from membership in the UN. Under Article 5 and 6 of the Charter, the General Assembly has the power to suspend or expel Members upon the recommendation of the Security Council. Suspension is predicated upon being a Member who has been subjected to Council "preventive or enforcement action."³⁰¹ Expulsion is reserved for Members who are considered persistent violators of UN principles.

As if the genocide of the Kurds were not sufficient justification for invoking the suspension or expulsion options, further justification is evidenced by Iraq's invasion of Kuwait. Just as Iraq felt no moral nor legal nor any other restraint with regard to its behavior concerning its own people so, too, did it behave unrestrained in its invasion of Kuwait. As explained by then UN Secretary General Boutros Boutros-Ghali, "The Iraqi invasion and occupation of Kuwait was the first instance since the founding of the [UN] in which one Member State sought to completely overpower and annex another."³⁰² The scope of this thesis does not include reliving or even summarizing the Gulf War of 1990 - 1991 in any

²⁹⁹ See generally, World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/Conf. 157/23, at 26 (1993).

³⁰⁰ UN CHARTER, at Prologue.

³⁰¹ *Id.* at Art. 5.

³⁰² UNITED NATIONS BLUEBOOK SERIES, UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990 - 1996, at 3 (1996).

significant detail, however, suffice it to say, the incremental measures taken by the Security Council and the General Assembly and the present-day challenges of enforcement reported daily in the news are clear and convincing evidence of Iraq's status as a "persistent violator" of the principles embodied by the UN. It required 845 pages (just from 1990 - 1996, not including the last 1 years) to document all the Resolutions and enforcement efforts necessary to compel Iraq's conformity with the peace terms per its defeat.³⁰³

Although not widespread, the General Assembly has acted (at least indirectly) to suspend the benefits of membership on one occasion - in the case of South Africa in the 1970's.³⁰⁴ Beginning in 1970, the General Assembly challenged the credentials of the South Africa representative. For several years the credentials were rejected; the reasons cited were that the delegate represented less than 20% of the population and the ruling regime committed atrocities against the non-white majority.³⁰⁵ The General Assembly requested the Security Council examine the relationship between the UN and South Africa and the Council responded with a proposal to recommend expulsion of South Africa, pursuant to Article 6. France, the United Kingdom, and the United States vetoed the recommendation.³⁰⁶

Critics of this option indicate that expulsion would result in loss of UN influence "over the recalcitrant state." Suspension or the threat of suspension may be more effective.³⁰⁷ In my opinion, especially in light of current events, if Iraq continues to resist weapons inspection procedures,³⁰⁸ it should be considered as a viable option. Seven years is too long to await compliance with the Resolutions enacted.

2. Existing UN Enforcement Mechanisms. Other options under existing UN enforcement systems were explained in Part III, *supra*, including filing 1235 and 1503 complaints. Both are applicable here and would formally invoke the procedures already in place.³⁰⁹ The same reasoning applies to bringing the Kurdish genocide to the attention of the UN High Commissioner of Human Rights. She or the UN Commission on Human Rights can appoint a special rapporteur to investigate the allegations.³¹⁰ (Additional discussion on this topic is

³⁰³ *Id.* at 1 - 845.

³⁰⁴ FREDERIC L. KIRGIS, JR., *INTERNATIONAL ORGANIZATIONS*, at 585 (1993).

³⁰⁵ *Id.* at 586 - 589, *citing* UN Secretariat Summary of UN Credentials Practice through 1973, 1973 U.N. JURIDICAL Y.B. 139, 140 - 141.

³⁰⁶ *Id.* at 588.

³⁰⁷ *Id.* at 585.

³⁰⁸ Nicole Winfield, *Inspecting Presidential Sites*, NEW YORK TIMES, 26 February 1998, at A1. *See also generally*, WASHINGTON POST, December - March 1998. The inspection challenges have improved after the Secretary General negotiated an agreement with Iraq to cooperate with the UN inspector team. It was signed on 22 February 1998. *See*, the Associated Press, *Text of the United Nations Iraq Agreement*, THE NEW YORK TIMES, 24 February 1998, at A1.

³⁰⁹ ECOSOC res. 1235 (XLII) of June 6, 1967 and ECOSOC Res. 1503 (XLVII) of May 27, 1970.

³¹⁰ G.A. Res. 48/141 (1994). As noted earlier in Part III, C, a Special Rapporteur for Iraq has been

forthcoming in the next section, *infra*.) Certainly they can enlist the support of the Human Rights Watch NGO that has done an exhaustive investigation on the subject. (See Part II, *supra*.) If Iraq does not cooperate, that would provide an additional basis for suspending its membership in the UN.

Next, as described in Part III, *supra*, the Human Rights Committee could enforce the country human rights reporting requirement and request Iraq describe its human rights progress. Depending on its responses, HRC can recommend remedial actions.³¹¹ Iraq's third Art. 40 report was submitted shortly after the Gulf War. HRC was not very impressed. Iraq seemed more concerned with post-war events and the effect of economic sanctions, than addressing human rights issues.

Members of the Committee also expressed deep concern with regard to the existence in Iraq of special courts, as well as death penalty sentences without any possibility of appeal; the situation . . . [of] repressive action of the Government, particularly against the Kurds and the Shiites. Indeed, it was their overall impression that a situation of serious human rights violations that had already been very disturbing in 1987 had persisted and worsened throughout the intervening period.³¹²

Finally, if a state lodges a complaint against Iraq, HRC can resolve it, under its power to settle inter-state complaints. Iraq has not ratified the Optional Protocol to the ICCPR, therefore, the individual petition process is not available to its citizens.³¹³

3. *Special Rapporteur for Iraq.* An additional note about the Special Rapporteur option available within the existing UN structure. Special Rapporteurs are investigators on fact-finding missions. They are given a specific mandate by whatever UN Commission appointed them.³¹⁴ As mentioned earlier, Iraq has been assigned a Special Rapporteur since 1991.³¹⁵ In its mandate from the High Commissioner, mention is made of Iraq's horrid, systemic violations of human rights including: systemic torture, arbitrary executions, cruel decrees and involuntary disappearances. No specific mention was made of the genocide or use of chemical weapons.³¹⁶

assigned since 1991. In reviewing the Special Rapporteur's mandate, however, it is apparent that the High Commissioner's focus has been upon the infractions related to the Gulf War and later, not the genocide of the Kurds.

³¹¹ ICCPR, *supra* note 116, Art. 40(1).

³¹² KIRGIS, INTERNATIONAL ORGANIZATIONS, *supra* note 308, at 958, citing *Concluding Observations on Reports by some State Parties Submitted under Article 40 of the Covenant*, UN Human Rights Committee, 1991, 46 GAOR Supp. No. 40 (A/46/40), Chapter III.

³¹³ HANNUM, HUMAN RIGHTS PRACTICE, *supra* note 108, at Appendix E, 280.

³¹⁴ *Id.* at 62-63.

³¹⁵ *Id.*

³¹⁶ UNHCHR Res. 1996/72, adopted 23 April 1996.

In the Special Rapporteur's most recent report from February 1997, he concludes that human rights in Iraq have not improved except regarding availability of food and health care.³¹⁷ He explains that despite requests for Iraqi assistance, thousands of disappearance cases remain unresolved. This leaves Iraq with decidedly the worst record in the world.³¹⁸ It is indeterminate from his report whether these are related to Anfal or just additional incidents that have occurred during and after 1991.

The Special Rapporteur system can be very effective. The reports are made public, unlike other charter-based human rights reports.³¹⁹ As noted herein, when discussing Rwanda at Part IV, B, it was the Rwanda Special Rapporteur whose report influenced the Security Council to approve the ICTR. In my opinion, the Special Rapporteur's mandate for Iraq should be expanded to include the genocide during Anfal. In time, formal adjudication of those crimes may be possible. If the Special Rapporteur's report confirmed the facts described in Part II which were garnered from an NGO investigation, that would lend even more credibility to the allegations. It may also influence other UN entities to act within their powers to restore Kurdish human rights. On a more critical note, Iraq has been completely uncooperative with the Special Rapporteur, leaving one to question its effectiveness in this particular circumstance, with this particular country.³²⁰

B. Security Council

The Security Council possess a few tools separate and distinct from the UN as a whole. Among those for consideration are: the creation of the ICTI; implementing or passing new resolutions; incremental peaceful Chapter VII measures; and use of force.

1. *Creation of the ICTI.* The most appropriate reaction to the genocide of the Kurds is the creation of an *ad hoc* International Tribunal for Iraq. The precedent is recently established in the creation of the ICTY and ICTR discussed at length, *supra*, Part IV. The Iraqi situation is similar enough to the circumstances in the former Yugoslavia and Rwanda to justify it. The crimes involved are nearly exact - planned government-sponsored campaigns of extermination of an identifiable group of people. Specifically, the similar

³¹⁷ ECOSOC Doc. E/CS.4/1997/57, dated 21 Feb 1997, at, III. A.

³¹⁸ *Id.* at, I.C., § 17.

³¹⁹ See generally, HANNUM, *supra* note 108, at 63.

³²⁰ ECOSOC Doc. E/CS.4/1997/57, dated 21 Feb 1997, at § 3.

atrocities include: Torture; mutilation; firing squads; executions without trials; murdering innocent women, children, noncombatant men, and the elderly; herding human beings like livestock, forcibly ousting them from their homes; rape; and completely destroying the group's physical environment. The chemical weapons horror was unique to Iraq, but otherwise, the atrocities described are virtually identical.

The Middle East Watch's exhaustive research efforts analyzing the 14 tons of documents recovered in 1992 and safeguarded by the US Foreign Relations Committee, the personal interview of hundreds of surviving witnesses and victims, and the physical evidence obtained during the brief visits to the exhumed mass grave sites combined with the physiological condition of Kurdish refugees that was consistent with the chemical weapons attacks, all establish a sufficient factual basis for creating the ICTI.³²¹ The UN Charter, Universal Declaration of Human Rights and Fundamental Freedoms as implemented by the ICCPR, and the Genocide Convention all ratified or acceded to by Iraq without substantive reservation or objection or subsequent revocation and nearly all of which are considered part of customary international law, establish the legal basis.

³²¹GENOCIDE, *supra* note 3, at xvii - xxx.

The consequences to two of the three large-scale violators of human rights in the 1980's and 1990's were ICT's. The former Yugoslavia had its ICT imposed upon them as part of the peace process; Rwanda sought out the ICT initially and its government favorably endorsed it except for a few technical details. In Rwanda, the militant parties responsible had been defeated by the new government in power when the ICTR was created. Iraq does not have to agree to an ICTI in order to validate it, however, if the Saddam Regime remains in power, its creation would probably require international force.

Support for an ICTI has even come from the U.S. Congress. "Senate Majority Leader Trent Lott (R-Miss.), maintaining his hard line in Washington, signaled support today for a proposed resolution calling on Clinton to back the idea of an international tribunal to indict, prosecute and imprison Saddam Hussein and other Iraqi officials, 'who are responsible for crimes against humanity, genocide, and other violations of international law.'"³²²

Criticism for the *ad hoc* Tribunals generally, is that they should not be premised upon whether Chapter VII powers can be invoked³²³ and specifically, that legitimate questions remain regarding the true extent of ICT's effectiveness.

Tens of thousands of people committed atrocities, yet, to-date, less than three dozen have been prosecuted. (See Part IV, A.3 and B.3, *supra*.)

What is needed according to Professor McCormack is a "uniform and definite corpus of international humanitarian law that can be applied apolitically to internal atrocities everywhere, and that recognizes the role of all states in the vindication of such law."³²⁴ It is easy to impose an ICT upon nations when the "international community [is] not directly involved in the fighting," opines McCormack regarding the ICTR and ICTY.³²⁵ On the other hand, it is inconceivable that the United States and Allied States in the Gulf War would have agreed to the creation of a war crimes tribunal for alleged atrocities on all sides in the Iraqi invasion of Kuwait and the subsequent operation to liberate Kuwait.³²⁶

The author makes no mention of accountability for the genocide of the Kurds. *Ad hoc* dispositions leave unpredictability and leave unanswered "who determines the characterization of a particular offense and on what basis."³²⁷

2. Use of Force. "The only option to stop the violation by the Saddam regime of the internationally recognized, basic rights of the Kurds to life, liberty,

³²² John M. Goshko, *U.N. Warns Iraq of Severest Consequences, Approval of Inspection Deal Vague on Authorizing Force*, THE WASHINGTON POST, 3 March 1998, at A1.

³²³ Timothy L. H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 682 (1997). Professor McCormack is the Inaugural Australian Red Cross Professor of International law.

³²⁴ *Id.*

³²⁵ *Id.* at 727.

³²⁶ *Id.*

³²⁷ *Id.* at 728.

home, family, and culture was to intervene in the situation by the use or threat of force."³²⁸ The author condemns the US and other major powers (read Western) States for failing to establish a mechanism for peaceful resolution of such violations. Thereby making the use of force the only way to achieve the human rights goals in this area.³²⁹

On the other hand, the decision to go to war is one that defines a nation, both to the world and perhaps, more importantly to itself. There is no more serious business for a national government, no more accurate measure of national leadership.³³⁰ For the world to give any less weight to such a decision than does a nation would be reckless and contrary to the purpose of the UN. In my opinion, use of force should be an absolutely last resort.

3. Other Security Council Actions. The Security Council has the power to pass various resolutions when the action of Member states threaten international peace and security. It may impose economic sanctions and take other measures not amounting to the use of force under its Chapter VII powers.³³¹ Compliance with requests for assistance from Member States is required.³³² Here the Council could demand that Iraq punish those responsible and take enforcement action as it is already required to do.

In response to continued human rights violations against the Kurds after the Gulf War, the Security Council did not respond with more force nor an ICTI, but it did respond with Resolution 688. The Council expressed "grave concern" over Iraq's actions against the Kurds which resulted in a colossal influx of refugees across international borders. The Council considered the situation a "threat to international peace and security."³³³ It condemned Iraq's repression and demanded that they "immediately end the repression" and cooperate with the UN. The Council insisted that they give humanitarian relief workers immediate access to the people in need.³³⁴ France, Iran, and Turkey had complained to the UN regarding the problems with Kurdish refugees, hence substantiating the "international" character of the situation.³³⁵

Many of these actions were taken after Iraq invaded Kuwait and the Secretary General believed the various measures to be effective.

³²⁸ Dr. Amir A. Majid, *International Human Rights and the Kurds*, 2 ANN. SURV. INT'L & COMP. L. 53, 61 (1995). Dr. Majid is a Senior Lecturer in International Law at London Guildhall University.

³²⁹ *Id.* at 61 - 62.

³³⁰ Bob Woodward, *THE COMMANDERS*, at 34 (1991) referring to President Bush's decision to go to war with Iraq after it had invaded Kuwait.

³³¹ UN CHARTER, Art. 41.

³³² *Id.* Art. 48.

³³³ S. C. Res. 688, UN Doc. S/RES/688 (5 April 1991).

³³⁴ *Id.*

³³⁵ KIRGIS, *INTERNATIONAL ORGANIZATIONS*, *supra* note 308, at 854.

By the use of sanctions and other enforcement measures, through efforts to institute a programme of disarmament and weapons control, in the provision of humanitarian assistance, and with programmes in areas such as boundary demarcation, compensation for damages caused by the invasion and the promotion and protection of human rights, the United Nations has broken new ground as peacemaker, peace-keeper and peace-builder.

.

In the conflict's immediate aftermath, the successful reversal of Iraq's aggression seemed to herald a new era for the United Nations, and the hope was widely expressed that the United Nations would and could bring to other global problems the same sustained commitment of political will and material resources that it had summoned in addressing the invasion and occupation of Kuwait.³³⁶

For the past seven years, the sanctions have continued. In the opinion of one author, this has had harsh consequences on the people. "Iraq has faced seven years of tough, United Nations imposed sanctions that make normal commerce - and, for many people, normal life - a nearly impossible challenge."³³⁷ Given Iraq's continued lack of cooperation, one must question the effectiveness of such actions.

C. International Criminal Court

Another feasible alternative here is the creation of a permanent international criminal court [hereinafter ICC]. Currently, an ICC proposal is pending in the UN for possible establishment of a court this year. According to the draft statute, the court would have "inherent jurisdiction' over genocide" but jurisdiction over other "core crimes will be dependent upon the acceptance of the jurisdiction by the custodial state, the territorial state and the national state."³³⁸

Other core crimes are defined as "crimes against humanity," the crime of aggression, and grave breaches of the laws of war.³³⁹

Such a court was envisioned during the Genocide Convention negotiations 50 years ago. Article VI in the Convention expressly provides for trial of genocide suspects "by such international penal tribunal as may have jurisdiction."³⁴⁰ According to Professor McCormack, when the signatories

³³⁶ UNITED NATIONS BLUEBOOK SERIES, UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990 - 1996, at 3 and 114 - 115 (1996).

³³⁷ Nora Bousany, *Browsing an Earlier Age*, WASHINGTON POST, 13 March 1998, at A1.

³³⁸ McCormack, *Selective Reaction to Atrocity*, *supra* note 327, at 729.

³³⁹ *Id.*

³⁴⁰ Genocide Convention, *supra* note 103, at Art. VI.

adopted this Article, "the international community envisaged the creation of an international criminal court which would be well placed to supplement the role of national courts in the repression of genocide and of other international crimes."³⁴¹

Of course, it did not happen and States were left to enforce it domestically. The same author believes the new court will happen, however, he does not think the subject matter jurisdiction is as broad as international enforcement could and should be.³⁴²

I doubt seriously that Iraq with its decade-long record of spurning international law would ratify such a treaty. If the ICC is created as proposed, however, jurisdiction over genocide would exist.

D. Self-Determination

The UN Charter provides for the right of all people to self-determination.³⁴³ The Charter, of course, was written in the 1940's, during a time when most of Africa and many areas of Asia and Latin America were colonies. Apartheid still existed. The Charter protected "trusteeships," the mechanism for controlling non self-governing territories, as the colonies were called.³⁴⁴ It was in this context that the Charter provided for the right of self-determination. The limits of this thesis do not support an extensive analysis of this topic, however, it is a rational choice and one fairly raised throughout earlier discussions.

The concept of self-determination embraces the notion of people having the right to choose their sovereign. It has not been extended to give people the right to succeed, nor is the international community prepared to support succession as a general rule. It has come to mean that people have the right to "freely determine their political status and freely pursue their economic, social and cultural development."³⁴⁵ It was used to help justify decolonization, however, its application to non-colonial settings has not been agreed upon by the international community.³⁴⁶

Some countries have supported the creation of a separate and autonomous Kurdish region - granting the Kurds their rights to self-determination. Brief periods of separate geographic region and government have existed for the Kurds. (See Part II, *supra*.) Immediately after the Gulf War, the British planned and

³⁴¹ McCormack, *Selective Reaction to Atrocity*, *supra* note 327, at 722.

³⁴² *Id.* See also, Barbara Crossette, *World Criminal Court Having Painful Birth*, 13 August 1997, N.Y. TIMES. Quoting interviews with U.S. diplomats and legal experts, the article explains that the US has concerns over the new court being able to by-pass the Security Council, ensuring that the court's jurisdiction be limited to the crimes described, and apprehension in Africa that the [ICC] would have too much power to intrude in a country's internal affairs, at 2, *reprinted in* <<http://www.hri.ca/doccentre/icc/nytimes-130897.shtml>>.

³⁴³ UN CHARTER, Art. 1 (2).

³⁴⁴ *Id.*, Art. 73 - 91.

³⁴⁵ Ved P. Nanda, *Revisiting Self-Determination as an International Law Concept: A Major Challenge in the Post-Cold War Era*, 3 ILSA J. INT'L & COMP. L. 443, 448 (Winter 1997).

³⁴⁶ *Id.* at 444.

protected a "safe haven" for Kurds in the northern region of Iraq. It was enforced for a time by them, the US and other Allies. The Security Council, however, refused to formalize such an arrangement arguing that it violated Article 2 of the Charter. Ironically, similar methods are being used in Bosnia with some success.³⁴⁷

I do not believe that the world-community would support Kurdish self-determination if it meant providing them with territorial sovereignty. The Kurds straddle 5 different nations. These are the same nations with thousands of years of historical war, aggression and insurgency and complete disregard for each other. The Kurds are yet one more issue over which they fail to cooperate. Some Kurdish territory has significant oil reserves, making it doubly unlikely that such a move would be supported. Although I think that the Kurds could make a reasonable case for self-determination, especially that which encompasses political and economic freedom, two things will prevent its fruition: opposition by Turkey, Iran and Iraq and Kurdish in-fighting. The Kurds are not even united amongst themselves in their efforts to become permanently autonomous, thereby diminishing their effectiveness. The PUK and KDP factions continue to fight one another.³⁴⁸

E. Other Options

First, the world could help establish a new Iraqi government. Ahmed Chalabi, the president of the council for a Kurdish-based opposition group, requested support from the US Senate in a recent subcommittee meeting of the Senate Foreign Relations Committee.³⁴⁹ Ousting Saddam Hussein and his regime might be incredibly effective, however, I doubt that the US or other UN Members would publically pursue such action at this juncture.

Next, the regional governments could attempt to resolve matters, like NATO did in the former Yugoslavia. Although the Middle East has no regional human rights enforcement mechanism, it could develop one. Granted, this would be very amazing, given the commitment (or lack thereof) each has made to human rights, but, as mentioned in Part III, Africa has done it and continues to show progress in the human rights arena. So, too, could the Middle East do it and therefore, this could become an alternative to pursue diplomatically. Historically (as described in Part II, *supra*), this region is home to the most ancient civilizations on earth, yet, it practices some of the most infantile policies regarding individual basic rights and freedoms. As seen in Europe, regional enforcement can be incredibly effective.

VI. CONSEQUENCES OF INACTION

³⁴⁷ Majid, *supra* note 332, at 63.

³⁴⁸ Douglas Jehl, *Faction of Kurds Supported by Iraq takes Rival's City*, NEW YORK TIMES, 10 September 1996, A1.

³⁴⁹ Goshko, *supra* note 326, at A1.

For 10 years, the Kurdish genocide from the Anfal Campaign has gone unpunished. During that time of inaction, Iraq invaded Kuwait, the Kurds rebelled in 1991, the British helped establish a safe haven for Kurds in the north, the Saddam regime continued to abuse the Kurds, massive numbers of Kurds became refugees causing problems with other nations, Kurds who fled to Turkey from Iraq (and Turkish Kurds already living in Turkey) suffered human rights violations that are the subject of a number of complaints being investigated by the Kurdish Human Rights Project and adjudicated by the European Human Rights Commission, and Saddam Hussein belligerently resisted efforts of UN weapons inspectors to finish the work of clearing out all weapons of mass destruction, triggering more UN action.

How do these events relate to the atrocities against the Kurds? These events show clearly the consequences of inaction. The genocide ended in 1988; two years later, Saddam and his arrogant army attacked Kuwait. Escalation is one of the consequences of ignoring the acts that occurred to the Kurds. Iraq attacked because, in my opinion, they believed themselves to be invulnerable.

Immediately after Iraq's defeat in the Gulf War, the Kurds and Shiites instigated a major rebellion to overthrow the Iraqi government. Many countries were verbally supportive and a few had even "directly advocated the forcible overthrow of the Saddam Regime."³⁵⁰ These were two separate battles - the Shiites in the south, the Kurds in the north. Some Western countries were concerned that the Shiites would form another "fundamentalist regime" like Iran and as a result they did not provide much real support for the rebellion. The Kurds fought for independence, "a separate homeland." Iraq fought even stronger against them.³⁵¹ Both attempts were quashed within weeks. Thousands of Kurds that had survived Anfal perished at the hands of the Iraqi soldiers or as starving refugees in flight across the borders. Some estimated over 2000 died, per day.³⁵² As recently as December 1997, "Turkish troops were taking part in an operation against separatist Kurdish guerrillas in northern Iraq," against a Kurdish Workers Party (PUK) faction of Kurds, still struggling for freedom.³⁵³ Apparently, neither Iraq nor Turkey supports an independent Kurdistan.

One might argue that inaction is the lawful thing to do. After all, the UN Charter forbids interference in the "matters essentially within the domestic jurisdiction of any State."³⁵⁴ Although the revered notions of state sovereignty have eroded in the human rights law, however, I think Iraq would be able to withstand most criticism regarding self-defense during the insurrections in 1991. The "inherent" right to self-defense is clearly spelled out in the Charter, as

³⁵⁰ Majid, *supra* note 332, at 53 - 54.

³⁵¹ *Id.* at 55.

³⁵² *Id.*

³⁵³ World in Brief, *20,000 Turkish Troops in Northern Iraq*, 6 December 1997, THE WASHINGTON POST, at A18.

³⁵⁴ *Id.* at 56. See also, UN CHARTER, Art. 2(7).

well.³⁵⁵ Of course, that does not excuse murdering noncombatants, violating international humanitarian law, nor the genocide.

Another consequence is the plight of tens of thousands of refugees who are having problems in neighboring countries and non-neighboring countries that have volunteered to rescue them. For example, Turkey, Iran, and Italy have all complained to the UN and its Refugee Committee about the problems caring for hundreds of thousands of displaced Iraqi Kurds. Some 200,000 refugees live in the barren mountainous border region of northern Iraq, where opportunity for survival is dismal.³⁵⁶

Finally, foregoing appropriate action results in an attitude of inviolability that has been evident recently in the weapons inspection crisis, Showdown with Iraq, that permeated the news from December 1997 until March 1998, and in fact, is still not completely resolved. Not only did Saddam Hussein feel no restraint to protect the Kurds, no restraint from bullying his way into Kuwait, neither does he feel compelled to honor the inspections regime set up by the UN. Although the Secretary General seems to have averted a crisis with Iraq, as discussed in Part V, *supra*, I do not think it is too bold to presume that most of the world's governments do not trust that the crisis is over. The major powers may have disagreed to use force at the moment in time when Saddam restricted the access of the inspectors, however, the threat he poses with his potential arsenal of chemical and biological weapons seems ominous and he seems to possess the will to use them.³⁵⁷ That is a consequence of ignoring abuse. If one would treat one's own citizens in the manner that the Saddam Regime has done, I doubt that limitations from or against the outside world or respect for international law, enters into the formula for decision-making.

³⁵⁵ UN CHARTER, Art. 51.

³⁵⁶ Majid, *supra* note 332, at 62 - 64. See also, Opinion & Editorial, *Turkey Loses its Balance*, 18 December 1997, THE WASHINGTON POST, at A26.

³⁵⁷ Office of the Secretary of Defense, Background Briefing, *Iraq's Chemical & Biological Weapons Capability*, 14 November 1997, DEFENSE LINK NEWS. John M. Goshko, *U.N. Warns Iraq of Severest Consequences, Approval of Inspection Deal Vague on Authorizing Force*, THE WASHINGTON POST, 3 March 1998, at A1. William Drozdiak, *U.S., Russia Clash over Iraq Policy*, 18 December 1997, THE WASHINGTON POST, at A1. See also, Opinion & Editorial, *Turkey Loses its Balance*, 18 December 1997, THE WASHINGTON POST, at A26. See generally, UNITED NATIONS BLUEBOOK SERIES, UNITED NATIONS AND THE IRAQ-KUWAIT CONFLICT 1990 - 1996 (1996).

VII. CONCLUSION

This is not just another horrific episode of a nation killing its own people, a scenario that is in and of itself intolerable under international law. It is aggravated by the use of chemical weapons, forbidden decades earlier in the early 20th century Hague and Geneva Conventions treaties to which the nation of Iraq is a party. Omar, the farmer's description of victims "bleeding from the mouth . . . as if their brains had exploded"³⁵⁸ almost makes the Nazi gas chambers seem humane, almost. And yet, the world's response to the Nazi atrocities was the very creation of the United Nations and adjudication of the crimes by an international military tribunal and domestic courts.

Genocide is a crime over which the international community professes universal jurisdiction. Iraq's actions prove intentional genocide - murder, firing squads, starvation, killing the animals, bulldozing any semblance of habitat and destroying any ability to subsist in an area formerly known as "home" to hundreds of thousands of people. The proposed ICC would include this crime as one over which the court would have mandatory jurisdiction. The statutes for recent *ad hoc* tribunals for Rwanda and the former Yugoslavia both have cognizance over the crime of genocide, as well as other crimes against humanity and law of war violations. The Iraqi genocide of the Kurds falls within the definitional parameters and precedential adjudication methods used in this decade to punish genocide. Those methods must be asserted here. Iraqi leaders are responsible for genocide, chemical weapons attacks, crimes against humanity, torture, and law of war violations. They should face an *ad hoc* international criminal tribunal. The world-community should NOT wait for the birth of the ICC nor risk problems with its being created by treaty, a treaty to which Iraq might not be a party. Use the tools already in place and operating somewhat successfully. The UN Security Council should convene an ICTI.

When Eleanor Roosevelt described how human rights recognition must begin at home - in the factories, farms, and towns of every person - she clearly intended that those rights extend to the farmers and villagers within the borders of Iraq.³⁵⁹ Even rebels in a civil war are entitled to humane treatment, that is recognized within the laws of war and non-derogable human rights. The *peshmergas'* rights, not just those of the non-combatants, were violated also in a most grievous manner. Such violations cannot and should not be ignored.

Systemic and deliberate denials of basic human rights lie at the root of most of our troubles and threaten the work of the UN.

It is not only fundamentally wrong that millions of men and women live in daily terror of secret police, subject to seizure, imprisonment, or forced labor without just cause and without fair trial, but these wrongs have repercussions in the community of nations. Governments which systemically disregard the

³⁵⁸ GENOCIDE, *supra* note 3, at 116.

³⁵⁹ LASH, *supra*, note 1, at 81.

rights of their own people are not likely to respect the rights of other nations and other people and are likely to seek their objectives by coercion and force in the international field.³⁶⁰

Today, we live in a world where the individual person has rights paramount to those of the nation-state. The human rights evolution entitles the Kurds to justice. The birthright of all human beings includes life and human dignity. It bears repeating an earlier quote of Mrs Roosevelt's:

Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they *are* the world of the individual persons; the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.³⁶¹

³⁶⁰ George Marshall, US Secretary of State, opening remarks at the General Assembly session in 1948, 19 Dept State Bull. 432 (1948).

³⁶¹ LASH, *supra*, note 1, at 81.

RETHINKING INTERNATIONAL SELF-DEFENSE: THE UNITED NATIONS' EMERGING ROLE

Commander Byard Q. Clemmons & Major Gary D. Brown¹

I. INTRODUCTION

We shall defend our island, whatever the cost may be, we shall fight on the beaches, we shall fight on the landing grounds, we shall fight in the fields and in the streets, we shall fight in the hills; we shall never surrender.²

The cornerstone of Churchill's stirring speech to the British people was defense. Fighting everywhere and with every available means was acceptable as long as British stood the moral high ground: the defense of their nation. The great man understood that, as long as Britain acted in self-defense, the people of his nation, and of the world, would rally to the cause. Self-defense is a powerful and necessary concept.

The right of international self-defense has been recognized as long as there has been international law. It is an essential and instinctive right, and one that would be asserted by nations absent recognition in international law. Nevertheless, the right has been stretched to, and arguably beyond, its reasonable application. Self-defense in situations that do not truly threaten a nation's sovereignty or existence, self-defense in the face of anticipated, attenuated threats; these and other assertions of the right have weakened legitimate and proper exercises of self-defense, and have highlighted the need to rethink the acceptable parameters of acting in the name of self-defense.

The most obvious alternative to nations acting on their own to protect their interests has been tried before: a strong international body with the ability to enforce international standards. An early example of this was Greece's Delian League, whose members joined together to protect themselves from Persia and to police the Aegean Sea.³

¹Commander Clemmons, JAGC, USN (A.B., Kenyon College; J.D., Oklahoma City University; LL.M., Harvard Law School) is Deputy Staff Judge Advocate, Headquarters United States Strategic Command, Offutt Air Force Base, Nebraska. He is a member of the Oklahoma State Bar. Major Brown, USAF (B.Sc., Central Missouri State University; J.D., University of Nebraska; LL.M., Cambridge University) is Chief, International and Operational Law at Strategic Command and is a member of the Nebraska State Bar.

²Winston Churchill in a 1940 speech before the House of Commons, quoted in A DICTIONARY OF MILITARY QUOTATIONS 13 (T. Royle ed. 1990).

³LARRY L. FABIAN, SOLDIERS WITHOUT ENEMIES 39 (1971).

Philosophers throughout the Middle Ages alluded to the creation of a world peacekeeping body.⁴

The League of Nations was the first of two significant modern attempts to execute this ancient idea.⁵ It was rightly judged a failure. The second, the United Nations, was also structured to enforce international standards; the jury is still out on the success of this organization. Before the United States' victory in the Cold War, the U.N. was most frequently a stadium for an ongoing game of dueling vetoes. Times have changed, however, and the U.N. is now able to deal more effectively with the crises it was designed to address.

This article examines the historical right of self-defense and proposes that exercise of the right should be curtailed in favor of effective action by the United Nations, which is now possible.⁶

II. HISTORICAL RIGHT OF SELF-DEFENSE

An early difficulty in establishing functional rule concerning a nation's right of self-defense was that nations were deemed to have an unlimited right to go to war.⁷ The right to make war was therefore limited only by internal resources and controls. Disregarding the cases in which there were internal controls, it was not until the development of the Covenant of the League of Nations and the Pact of Paris that a formalized right of self-defense under international law became meaningful.

The Covenant of the League of Nations made war an item of international concern.⁸ "War was no longer to have the aspect of a private duel but of a breach of the peace which affected the whole community."⁹

⁴ *Id.* at 40.

⁵ See discussion *infra*, pp. 22-26.

⁶ This article will not distinguish between the concepts of self-defense and self-preservation. Early international law commentators made much of the difference between the two, but in modern usage making a distinction is of little moment. At best we might note that self-preservation is clearly a desired result of self-defense.

⁷ DEREK W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 174 (1958).

⁸ While alliances and the interdependency of nations, at times (e.g., World War I), made war an international concern as a matter of reality, there was no significant formal declaration setting forth this concept.

⁹ IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 57 (1963).

The Kellogg-Briand Pact made recourse to war, other than legitimate exercises of self-defense, illegal.¹⁰

As an exception to the general historical practice that nations resorted to war whenever the mood struck them, the ancient Greeks looked for a rationale to undertake armed aggression. It was the law in Greece that, in order to be just, a war could not be undertaken without a valid cause.¹¹ As a result, the Greeks were perhaps the first to recognize officially a right of international self-defense, which would have been considered a valid cause for armed conflict. Plato spoke favorably of wars fought on defensive grounds.¹²

Plato, sometimes criticized as an advocate of war, also claimed that armed conflict was inevitable. His justification for this belief was that Greeks and barbarians were natural enemies, so aggression between them was unavoidable.¹³ The Greeks were thus still some distance from renouncing armed conflict.

The Romans also looked for justifications before engaging in war. Cicero indicated that self-protection was one of only two valid reasons for going to war.¹⁴

The right of self-defense began in municipal law, wherein it was stated that individuals were entitled to use force to defend themselves.¹⁵ From the very beginnings of international law, efforts were made to incorporate these developed concepts into the international arena.¹⁶ The key element of self-defense in municipal law was the requirement that it be necessary; *i.e.*, that the danger be real and present (at least imminent).¹⁷ In addition, municipal law required that there be no reasonable alternative to the use of force and that the defense be proportional.¹⁸

¹⁰ *Id.* at 235. Fifteen nations signed the Pact in 1928; when it went into force on July 24, 1929, 46 states were parties. ROBERT H. FERRELL, *PEACE IN THEIR TIME* 253 (1952); DAVID HUNTER MILLER, *THE PEACE PACT OF PARIS* 149 (1928). It did not bode well for the Pact that the United States and France struggled to prevent a declaration of war between the Soviet Union and China in Manchuria on the very day the Pact took effect. FERRELL, *supra*, at 260 note 17.

¹¹ COLEMAN PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME*, v. II 179 (1911).

¹² RONALD B. LEVINSON, *IN DEFENSE OF PLATO* 227 (1953).

¹³ *Id.* at 223.

¹⁴ M.A. Weightman, *Self-Defense in International Law*, 37 VA. L. REV. 1095 (1951); the other reason was to defend a nation's honor.

¹⁵ *Id.* at 1097.

¹⁶ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 176 (2d ed. 1993).

¹⁷ *Id.*

¹⁸ Weightman, *supra* note 14, at 1097.

Gentili identified the right in 1612 when he stated that self-defense in response to an armed attack is necessary, necessity being a requirement for a just war.¹⁹ Gentili's view of necessity was broad enough to encompass an anticipatory defensive attack by a threatened nation.²⁰

National self-defense was further elucidated by Grotius in his capstone work *De Jure Belli ac Pacis Libri Tres*.²¹ He, like Gentili, recognized that anticipatory self-defense might be appropriate, but specified that the future danger must be "immediate and imminent in point of time."²²

A. The *Caroline* Incident

The classic formulation of national self-defense came as a result of the *Caroline* incident in 1837.

During the Canadian rebellion of 1837, the ship *Caroline*, an American vessel, had been used to supply Canadian forces. The British commander believed that she might be used to resupply or reinforce Canadian rebels on Navy Island, which was Canadian territory near the shore of New York. *Caroline* was moored for the night at Ft Schlosser, New York when the British commander ordered her attacked.

The assault on *Caroline* was successful. After the occupants of the ship were forced ashore, during which melee two were killed, *Caroline* was set afire and towed into the river's current. The burning ship drifted downstream and eventually went over the Niagara Falls.²³

The United States was understandably upset that an American ship in U.S. territory was raided and destroyed by the British; they requested compensation. The British argued that *Caroline* was a legitimate military target as she had been used to resupply rebel forces. They believed that the attack had been a legitimate exercise of their right of self-defense.²⁴

¹⁹ ALBERICO GENTILI, *DE JURE BELLI LIBRI TRES* (1612), reprinted in 2 CLASSICS OF INTERNATIONAL LAW 58 (J. Scott ed. 1933).

²⁰ *Id.*

²¹ HUGO GROTIUS, *DE JURE BELLI AC PACIS* (1625), reprinted in 2 CLASSICS OF INTERNATIONAL LAW 172 (J. Scott ed. 1925).

²² *Id.* at 173.

²³ R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L. L. 82, 84 (1938).

²⁴ *Id.* at 87.

Attempts to negotiate a satisfactory resolution to the dispute were stymied until 1840 when a British subject named Alexander McLeod was arrested in New York. McLeod was apprehended after boasting that he had participated in the destruction of the *Caroline*. McLeod was charged with murder and arson. After twelve months imprisonment he was finally acquitted of the charges, but his predicament brought the incident back into the limelight.²⁵

In response to the British self-defense argument, the U.S. Secretary of State, Daniel Webster, called upon Britain to further justify the argument. Webster asserted that self-defense should be limited to cases in which the "necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."²⁶ Webster's description of the requirements for self-defense became the standard expression of the right. This standard has since been creatively sculpted, sometimes almost beyond recognition, but it is still the reference point for cases of national self-defense.

Ultimately, the *Caroline* incident resulted in an apology from Britain to the United States for its violation of American territory.²⁷

Modern formulations of the rule are generally more succinct. "The principal requirements which the 'customary law' of self-defense makes prerequisite to the lawful assertion of these claims are commonly summarized in terms of necessity and proportionality."²⁸ In other words, before a nation can exercise the right of self-defense, it first must show that the defensive aggressive action is necessary to protect itself or its citizens. Second, the nation is only entitled to take action which is proportional to the threat.²⁹

III. STRETCHING THE RULE

Naturally, countries have attempted to interpret the self-defense rules to encompass a full range of situations. Even before the *Caroline* incident, Britain had pushed the envelop of the rule. Taking that nation as an example, it is clear that an over-zealous exercise of self-defense is frequently used by

²⁵ *Id.* at 92; JOHN BASSETT MOORE, 2 DIGEST OF INT'L LAW 410 (1906).

²⁶ MOORE, *supra* note 25, at 412.

²⁷ Jennings, *supra* note 23, at 91. The United States also admitted that the circumstances were such that self-defense might have been justified, but was not. The resolution of the case, such as it was, occurred in 1842. MOORE, *supra* note 25, at 411.

²⁸ MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 217 (1961).

²⁹ BROWNLIE, *supra* note 9, at 261. Proportionality limits the action to that required to secure promptly the proper objectives of self-defense, generally compelling the opposition to stop the condition precipitating the response. See MCDUGAL & FELICIANO, *supra* note 28, at 242. See also Terry, *infra* note 47, at 174. It should be noted the evolving requirements for self-defense remain substantially the same as those originally set forth in municipal law.

nations to allow the nation to act beyond the bounds of international law while seeking to clothe the actions with legal justification.

Britain engaged in one of the least defensible historical examples of an exercise of claimed self-defense when it began the War of Spanish Succession (1701-14).

In 1700, the heirless King of Spain lay dying. Louis XIV, aggressive and expansionist, was the King of France. Louis' grandson, the Duke of Anjou, was offered the Spanish throne. This caused significant apprehension among the other European powers because, if France and Spain combined, hegemony by the resulting empire would be probable. Requests for assurances that this would not occur were declined, and Louis refused to bar Anjou from the French succession.³⁰

Louis' refusal was perceived as evidence of a design to dominate Europe by creating a powerful Franco-Spanish state.³¹ An alliance of European powers led by Britain went to war to prevent this domination. The British-led alliance asserted its actions were justified as a proper exercise of the right of self-defense.³²

A hundred years later Britain again demonstrated its ability at legal gymnastics when an attack on Denmark was justified as self-defense. Britain and France were at war in 1807. Denmark had a powerful fleet, but no army to protect its borders. French troops were massed in northern Germany, a threat to which Denmark could not respond. Britain was concerned that, with the Danish fleet, Napoleon could threaten Ireland, as well as the English and Scottish coasts.³³

³⁰ MICHAEL WALZER, *JUST AND UNJUST WARS* 7 (1977).

³¹ *Id.* at 79.

³² The War of the Spanish Succession lasted from 1701-14 and included such notable actions as the Battle of Blenheim and the British seizure of Gibraltar. The war ended with the largely politically motivated Peace of Utrecht.

³³ W. HALL, *INTERNATIONAL LAW* 282 (7th ed. 1917).

Faced with this strategic conundrum, Britain demanded that Denmark deliver its fleet to Britain for safekeeping. Britain pledged that all maritime equipment delivered to it would be restored to Denmark when peace prevailed.³⁴ Denmark refused to deliver the fleet. Consequently, British forces sailed to Copenhagen. The city capitulated after about three weeks of bombardment, and the British soon departed with the 76 ships of the Danish fleet that were present.³⁵ This action prevented Napoleon from becoming a sea power, but did little for British-Danish relations.

These two examples, along with British actions in the *Caroline* incident, demonstrate that a jurisprudentially creative nation can use the right of self-defense to justify virtually any aggressive action. The United States learned its lessons well, and has developed into one of the foremost abusers of the self-defense right.

IV. THE UNITED STATES AND SELF-DEFENSE

From early in its history, the United States concurred in the right of international self-defense, and interpreted it broadly.

Thomas Jefferson embraced the right of self-defense. "[T]he unwritten laws of necessity, of self-preservation, and of the public safety, control the written laws."³⁶ Jefferson believed that the United States had not only a right, but an obligation, to build a strong military to enable it to "punish the first insult; because an insult unpunished is the parent of many others."³⁷

One tangible result of this belief is the Monroe Doctrine. In 1823 the United States declared that certain acts would be injurious to the peace and safety of the country, and that the United States would regard them as unfriendly.³⁸ This was an expression of an intention to exercise the right of anticipatory self-defense if a European nation attempted to interfere with the Americas, or to extend its colonial system to any independent nation in the Americas.³⁹

³⁴ ALFRED T. MAHAN, *INFLUENCE OF SEA POWER UPON THE FRENCH REVOLUTION*, v. II at 277 (1894).

³⁵ Carl J. Kulsrud, *The Seizure of the Danish Fleet, 1807*, 32 AM. J. INT'L. L. 280 (1938).

³⁶ THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 607 (A. Koch & W. Peden ed. 1944).

³⁷ *Id.* at 378.

³⁸ Elihu Root, *The Real Monroe Doctrine*, 8 AM. J. INT'L. L. 427, 431 (1914).

³⁹ Beth M. Polebaum, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U.L. REV. 187, 190 (1984). As a result of rumors that France intended to deploy military forces to the New World to quell rebellions in Spanish colonies, President James Monroe outlined the doctrine in his annual message to Congress on December 2, 1823. He directed not only that European attempts to colonize the American continents would be regarded

Great Britain recognized that the Monroe Doctrine was acceptable under international law, and acquiesced in it in 1903.⁴⁰

Following the announcement of the Monroe Doctrine, and the subsequent international acquiescence in it, the United States' practice in this area has grown progressively broader. The United States now may be the holder of the "most creative interpretation" title.

In 1962 President Kennedy announced a quarantine⁴¹ on all offensive military equipment under shipment to Cuba. Kennedy asserted that the action was a "pacific blockade," and as such was a valid, peaceful means of settling a dispute under international law. He further stated that the action was taken in self-defense.⁴²

Traditionally, pacific blockades were undertaken as a reprisal⁴³ in response to an illegal act by the blockaded state. Further, the blockade interfered only with the vessels of the nation toward which it was directed.⁴⁴ The United States' blockade, however, was not aimed at correcting any illegal act by Cuba; instead it was an attempt to prevent the introduction of more Soviet missiles into Cuba. The blockade also interfered with Soviet ships. Consequently, some in the international legal community considered the action illegal.⁴⁵

Farther afield, both geographically and logically, have been U.S. actions in the Middle East.

as hostile, but also that the United States would refrain from involving itself in European disputes. It was not until a generation later that the policy became known as the Monroe Doctrine.

⁴⁰ Root, *supra* note 38, at 403.

⁴¹ The U.S. called the action a quarantine rather than a blockade, as a blockade is a belligerent operation and thus an act of war. NAVAL WARFARE PAMPHLET 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, paragraphs 7.1 and 7.7.1.

⁴² Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L. L. 546, 553 (1963).

⁴³ The concept of reprisal is discussed *infra* at note 49.

⁴⁴ Wright at 554.

⁴⁵ *Id.* at 563. Nonetheless, this creative use of the self-defense rules allowed the United States to claim legitimacy and gain some measure national and international political support.

On April 15, 1986, U.S. FB-111s flew from their bases in England to strike targets in Libya.⁴⁶ The assault was undertaken in response to a terrorist attack in West Berlin a few days earlier. There, a nightclub known to be frequented by Americans was bombed, killing two Americans and wounding 78. Evidence tied the Libyans to the terrorists who carried out the bombing.⁴⁷

A cable from Tripoli had directed Libyan terrorists to target U.S. interests in Berlin. The day before the attack, a return message to Libya was intercepted indicating that there would be an attack the following day; the day of the attack, the terrorists informed Tripoli that the attack had been a success. Other Libyan terrorist attacks were also afoot.⁴⁸

President Reagan on April 16, 1986, issued a statement indicating that the United States took action against Libya under Article 51 of the United Nations Charter; *i.e.*, he stated that it was an act of anticipatory self-defense in the face of clear and imminent danger. To some, if not most, in the international community this action more closely resembled an act of reprisal, an action not as universally accepted under international law.⁴⁹

In 1993, the United States launched a cruise missile strike against Iraq, arguing that the attack was necessary for the defense of the nation and its citizens.⁵⁰

The assault was undertaken on June 26, 1993, in response to an Iraqi plan to assassinate former President Bush. On June 28, the president of the United States stated that the action was taken under Article 51 of the U.N. Charter, and that it was intended to damage Iraq's ability to carry out future aggressive acts against the United States.⁵¹

⁴⁶ They carefully flew around France and Spain who refused to grant overflight permission. This is indicative of actions taken and the need to handle deftly the international political climate.

⁴⁷ James P. Terry, *Countering State-Sponsored Terrorism: A Law-Policy Analysis*, 36 NAVAL L. REV. 159, 180 (1986).

⁴⁸ *Id.* at 180.

⁴⁹ Reprisal is a concept in international law whereby an aggrieved nation may respond to a prior violation of the law of armed conflict with a proportional violation of armed conflict sufficient to get the original perpetrator to cease violating the law. If the original violation stops the responding violator must stop. While there are those in the international community who recognize reprisal as a legitimate arrow in the quiver of international laws, many do not. Self-defense is the far more politically acceptable label to put on a nation's actions.

⁵⁰ Letter from the President to the Speaker of the House of Representatives, June 28, 1993.

⁵¹ *Id.*

Another misadventure in the self-defense arena undertaken by the United States was in Nicaragua. In 1983 or 1984 the United States caused mines to be laid in three Nicaraguan ports. The mines were laid in the internal waters or territorial seas of Nicaragua.⁵²

The United States' undertook the action through the person of the *contras*, the name given to the rebels fighting the Nicaraguan government. The United States apparently believed that Nicaragua was providing arms to rebels in El Salvador.

Nicaragua appealed to the International Court of Justice (ICJ). The United States refused to recognize the court's jurisdiction, but made clear that it was acting under the auspices of collective self-defense based upon Nicaragua's arming of the Salvadoran rebels.⁵³ The ICJ rejected the United States' theory, and ruled in favor of Nicaragua.⁵⁴

Self-defense is at the heart of the United States military and all of its actions. The preamble to the United States Constitution indicates that one of the principal functions of a government is to "provide for the common defense."⁵⁵ With the exception of the Coast Guard, all U.S. military services now fall under the Department of **Defense**. The very purpose of having a military force is not for aggression but to defend.⁵⁶

The importance of self-defense to U.S. military strategy is demonstrated by the Rules of Engagement (ROE).⁵⁷ Throughout its ROE, the United States reflects the language of Article 51 of the United Nations Charter that nothing shall impair the inherent right of self-defense:⁵⁸ "Nothing in these rules is intended to limit the commander's right of self-defense."⁵⁹

⁵² *Nicaragua v. United States*, 25 I.L.M. 1023, para. 80 (1986).

⁵³ *Id.* at para. 24.

⁵⁴ *Id.* at para. 292.

⁵⁵ UNITED STATES CONST., PREAMBLE.

⁵⁶ See UNITED NATIONS CHARTER ART. 2, para. 4: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state...." And, "national security rests first on the concept of deterrence;" only if "deterrence fails ... we fight to win." JOINT PUBLICATION 1, JOINT WARFARE OF THE U.S. ARMED FORCES (11 Nov 91), at 1.

⁵⁷ CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01, STANDING RULE OF ENGAGEMENT (1 Oct 94).

⁵⁸ See UNITED NATIONS CHARTER ART. 51.

⁵⁹ Roach, *Rules of Engagement*, NAVAL WAR COLL. REV., January-February 1983, at 482.

The importance of self-defense was dramatically demonstrated in the attack on the USS *Stark* (FFG-31) in May of 1987 and the shooting down of an Iran Airbus, Flight 655 by the USS *Vincennes* (CG-49) in July of 1988, and specifically in a comparison of the two events⁶⁰ Following the *Vincennes* incident Vice President Bush noted:

The USS *Vincennes* acted in self-defense. . . . [The shoot down] occurred in the midst of a naval attack initiated by Iranian vessels against a neutral vessel and, subsequently, against the *Vincennes* when it came to the aid of the innocent ship in distress.⁶¹

There are myriad issues involved in both the *Vincennes* and the *Stark* incidents. But, clearly, the concept of self-defense loomed large in the *Vincennes* incident and left many in the Navy stating the rhetorical question: "Would you rather have been the Commanding Officer of the *Stark* or of the *Vincennes*?"

The issue of self-defense was a factor in the USS *Nicholas* case involving allegations that, at the inception of DESERT STORM, USS *Nicholas* fired on Iraqi oil platforms containing Iraqis attempting to surrender. An important factor in this case was intelligence that the platforms had communications equipment that, in the context of the war that had started, potentially put *Nicholas* in harms way. Counsel for *Nicholas* noted in argument to a board of officers reviewing the incident words to the effect: "I would want my son to be under command of *Nicholas* because I want my son to come home".⁶³

That self-defense is and will always be at the very core of all military operations and policy is irrefutable. But, the use of the self-defense provisions of Article 51 of the United Nations Charter as the primary basis for justifying extra-territorial action by a State is obsolete. As will be discussed below, there is a better way to keep the peace and protect our citizens. Through the use of an effective United Nations and other collective organizations, we will be free of unnecessary restrictions and attenuated international legal arguments.

⁶⁰ See Friedman, *The Vincennes Incident*, PROCEEDINGS/NAVAL REVIEW, May 1989, at 72.

⁶¹ Vice President George Bush, Address to the United Nations Security Council, July 14, 1988. For an in-depth analysis of many of the issues raised regarding the *Vincennes* incident, see Grunawalt, "USS *Vincennes* (CG 49) and the Shoot-Down of Iranian Airbus FLT 655," Naval War College Memorandum for Dean, Center for Naval Warfare Studies, September 18, 1992.

⁶² Co-author Commander Clemmons was counsel for *Nicholas*.

⁶³ Co-author Commander Clemmons was counsel for *Nicholas*.

V. ANTICIPATORY SELF-DEFENSE

As can be seen from the above examples, a subset of self-defense is anticipatory self-defense. Anticipatory self-defense is not a new idea; it has long been a part of the concept of self-defense and is part of customary international law.⁶⁴ Anticipatory self-defense ensures that a defender has sufficient flexibility to take defensive hostile measures without waiting for the first blow to strike.⁶⁵

To justify an anticipatory action as self-defense, the threatened injury must be "not remote nor constructive, but fairly inferable from the preparations and intentions of the other party."⁶⁶ When formulating the decision of whether to attack, the defending state must still ensure that the action in anticipation is proportional to the threatened attack.⁶⁷

Even though the right of anticipatory self-defense is well established, it offers fertile ground for torturing the self-defense concept. A modern case that is almost universally criticized as an illegitimate exercise of anticipatory self-defense is Israel's bombing of the Osiraq nuclear reactor in Iraq.

On June 7, 1981 eight Israeli F-16s rolled in on their target and totally destroyed Iraq's partly completed nuclear reactor at Osiraq. Israel explained its actions in terms of anticipatory self-defense.⁶⁸ In short, Israel justified its attack on the theory that Iraq refused to recognize Israel's right to exist, and endorsed violence against Israel.⁶⁹ A completed nuclear reactor would have allowed Iraq to create the nuclear material necessary to develop nuclear weapons. Those nuclear weapons could be used against Israel.⁷⁰ Therefore, argued Israel, its attack was lawful as self-defense.

⁶⁴ BROWNIE, *supra* note 9, at 257. The concept of anticipatory self-defense was embraced by Gentili and Grotius. *Supra* at p. 5.

⁶⁵ WALZER, *supra* note 30, at 74.

⁶⁶ THEODORE D. WOOLSEY, *INTERNATIONAL LAW* 185 (5th ed. 1878).

⁶⁷ BROWNIE, *supra* note 9, at 259.

⁶⁸ Louis Rene Beres & Yoash Tsiddon-Chatto, *Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor*, 9 TEMP. INT'L. & COMP. L.J. 437, 438 (1995).

⁶⁹ Louis Rene Beres, *Israel and Self-defense*, 8 AZ. J. INT'L. & COMP. LAW 89, 95 (1991).

⁷⁰ Anthony D'Amato, *Israel's Air Strike Against the Osiraq Reactor: A Retrospective*, 10 TEMP. INT'L. & COMP. L.J. 259, 260 (1996).

Israel's logic, however, was not universally accepted. The United Nations Security Council condemned Israel's attack, and most international scholars agreed that Israel had violated international law.⁷¹ That Israel faced imminent danger and was left with no time for deliberation is a difficult argument to make; the Osiraq reactor was not yet operational when it was destroyed.⁷²

The objections to an expansive notion of anticipatory self-defense are perhaps best summed up by Professor Quigley. "In a world hard pressed to stop aggressive war, it makes little sense to open a loophole large enough to accommodate a tank division."⁷³

Another consideration in this area is the effect of the proportionality rule. Usually, "to commit a state to an actual conflict when there is only circumstantial evidence of impending attack would be to act in a manner which disregarded the requirement of proportionality."⁷⁴ Responding to a mere threat with actual armed force could certainly be argued to be disproportionate.⁷⁵

The customary right of self-defense has existed since antiquity, but it has not been the only way to address international aggression. In the 20th century, there have been two grand experiments aimed at providing an alternative to individual aggressive action when states are threatened: the League of Nations and the United Nations.

VI. THE LEAGUE OF NATIONS

The League of Nations was created in the aftermath of World War I. It was formed out of a desire by the nations of the world to avoid the carnage of another world conflict and to encourage worldwide disarmament. Discussions on the subject of a league of nations began in 1918. President Woodrow Wilson was one of its foremost advocates, and he had a great vision of a viable world-wide organization.⁷⁶

⁷¹ *Id.*

⁷² *Id.* at 261.

⁷³ John Quigley, *A Weak Defense of Anticipatory Self-Defense*, 10 TEMP. INT'L. & COMP. L.J. 255, 257 (1996).

⁷⁴ BROWNLIE, *supra* note 8, at 259.

⁷⁵ How does one measure the proportionality of a response when there has been no actual act of aggression by the threatening state to serve as a baseline? Arguably, one must assess and balance the potential for damage the threat imposes and the imminence of the action. The potential scenarios are infinite and form a continuum. The imminence and magnitude of danger are clear if there are hundreds of tanks lined upon the border. Preparatory war-like actions such as widening roads, building war planes and training troops are more subtle. Terrorist activities can be subtler still.

⁷⁶ At the Versailles Conference (January - June 1919) following World War I, President Wilson obtained approval for his League of Nations.

The League officially was born on January 10, 1920. At its height it had 63 member nations. Although Wilson was instrumental in the creation of the League, and "had made the conception of a League of Nations dominant in all minds,"⁷⁷ the United States never joined.

President Wilson certainly desired that the United States become a member but, just as he launched his campaign to encourage U.S. membership in the League, he suffered a stroke. For nearly two years he continued in a debilitated state, unable to make his case for League membership to the American people. In 1920, the isolationist Republicans won the presidency and any hope for U.S. membership in the League of Nations died.⁷⁸ Ultimately, nationalism proved too strong for the weak League of Nations, not just in the United States, but in the world at large.⁷⁹

The Covenant of the League of Nations created express obligations on its members to employ pacific means of settling disputes, and established a central organization of states to pass judgment and employ sanctions if members failed to comply with their obligations.⁸⁰

Some argued that the Covenant of the League of Nations was limited by its use of the phrase 'resort to war' as not all armed conflict rises to the level of war.⁸¹ Article 10 was seen as prohibiting all war except in self-defense; the Covenant did not affect the legitimate exercise of self-defense.⁸²

The Covenant was binding only on members, another fact seen as a shortfall.⁸³

During its 46 year life, the League of Nations acted or attempted to act in many cases. As illustrative of its actions, the cases of Upper Silesia, Ethiopia and Manchuria are discussed.

⁷⁷ WINSTON S. CHURCHILL, *THE GATHERING STORM* 3 (1948).

⁷⁸ *Id.* at 13.

⁷⁹ On March 19, 1920, the United States Senate refused to ratify the League of Nations Covenant.

⁸⁰ JAMES LESLIE BRIERLY, *THE LAW OF NATIONS* 408 (6th ed. 1963).

⁸¹ BROWNLIE, *supra* note 9, at 59. The use of the word 'war' played a part in the League's debate regarding the Manchurian crisis. *Id.* at 60; *infra* at p. 23. Clearly, however, the intent of the League was to prevent armed conflict and provide an alternative to resort to self-defense.

⁸² BROWNLIE, *supra* note 9, at 63; BRIERLY, *supra* note 79, at 411.

⁸³ LOUIS HENKIN, *HOW NATIONS BEHAVE* 137 (2d ed. 1979). And, in this case, rightly so. As membership was far from universal and major powers like the United States were not included, the League had limited power and authority.

In the mid-18th century, Austria lost Upper Silesia to Germany's Frederick the Great. Most of the residents of the area at the time were Polish, although Upper Silesia had not been Polish since the 12th century. Frederick desired the area as a military stronghold, and for its valuable minerals and coal deposits. By the beginning of World War I, there were about two million German and Polish inhabitants of Upper Silesia.

After the first World War, the area was to be ceded to Poland under the Treaty of Versailles. Its industrial resources were to help enable Poland to become a stabilizing force in Central Europe. Britain disagreed with this plan, however, and supported the idea that Polish-German frontiers should be determined solely on ethnic grounds.⁸⁴

Negotiations between the interested powers resulted in an agreement to conduct a plebiscite, with voting by regions. The voting showed definite ethnic divisions by region. Partitioning of the area was inevitable.

In the resulting confusion, German and Polish troops were massed to attack while British and French troops stood silently, watching. A few Italian troops who acted to maintain order were killed.

During a pause in the hostilities, what could have been the calm before the storm, Britain and France referred the controversy to the League of Nations.

The referral to the League of Nations was greeted by laughter.⁸⁵ Despite the incredulity of the public, Britain and France agreed to accept as binding the League of Nations' decision.⁸⁶

The League designed a creative partition of the area, linking German and Polish zones that had shown clear ethnic majorities. It also created an effective industrial zone that operated across national frontiers.⁸⁷ The industrial area operated successfully for 15 years, until 1937. Conditions then made renewal of the industrial agreement impossible.

Contrasting with the relatively effective action of the League in Upper Silesia was its failure to take action in Manchuria.

⁸⁴ BYRON VINSON DEXTER, *THE YEARS OF OPPORTUNITY* 108 (1967).

⁸⁵ *Id.* at 115.

⁸⁶ One must wonder if Britain and France would have been so accommodating if the matter at issue had been of greater importance to them. The actions these nations took in the Italo-Ethiopian conflict, discussed *infra*, probably answers the question. This demonstrates the weakness of the League which had no real independent, self-sustaining power.

⁸⁷ DEXTER, *supra* note 83, at 108.

In 1931, Japan invaded Manchuria, which was part of China. The League of Nations debated the appropriate response, eventually determining that the new state should remain unrecognized and that Japan should be condemned officially for its hostile action. A League commission produced the Lytton Report, a document recommending that Manchuria become an autonomous state under the aegis of the League.⁸⁸

Unfortunately, these events happened at a leisurely pace during the hostilities, and no proposal was ever made to take military action to prevent the Japanese aggression.⁸⁹ Japan ignored the League recommendations, and no sanctions were imposed. "The moral authority of the League was shown to be devoid of any physical support at a time when its activity and strength were most needed."⁹⁰

The way the world viewed the League of Nations changed as a result of its failure in Manchuria. "The small powers, in particular, had learned to doubt, not so much the efficacy of the League system, as the will of the great powers to apply it."⁹¹ That lack of will probably led to the next crisis to confront the League.

Italy's invasion of Ethiopia in 1935 again tested the mettle of the League. Ethiopia pleaded for help from the League of Nations. The members of the League voted that Italy had committed acts of war. That triggered the League's only recourse against aggressors: economic sanctions.⁹²

The sanctions approved prohibited the shipment of war materials to, and the purchase of exports from, Italy. They also prevented the shipment to Italy of certain raw materials, such as aluminum, but allowed the shipment of others, such as coal, oil, iron and steel.⁹³

The limited sanctions failed to cut off Mussolini's essential war supplies, and he was able to complete his victory over Ethiopia.⁹⁴ This failure set the stage for the League's downward spiral toward oblivion.

⁸⁸ CHURCHILL, *supra* note 76, at 88.

⁸⁹ THE UNITED NATIONS POLITICAL SYSTEM 37 (D. Kay ed. 1967).

⁹⁰ CHURCHILL, *supra* note 76, at 88.

⁹¹ Kay, *supra* note 88, at 37.

⁹² JAMES DUGAN & LAURENCE LAFORE, DAYS OF EMPEROR AND CLOWN: THE ITALO-ETHIOPIAN WAR 1935-1936 181 (1973).

⁹³ *Id.* at 184.

⁹⁴ Unknown in the international community was the agreement between Britain and France to allow only economic, as opposed to military sanctions, as far as possible. Both nations were apprehensive about what action the volatile Mussolini might take, and were hoping to salvage a productive relationship with Italy. *Id.* at 182.

The final challenge facing the League of Nations, a crisis that required a strong peacekeeping body, resulted in agreed attrition and, eventually, the effective dissolution of the League. The final examination for the League of Nations was whether it could prevent another World War. It faced the test and was found wanting. The League was formally dissolved on April 18, 1946 to make way for the United Nations.⁹⁵

VII. THE UNITED NATIONS: THE FIRST HALF CENTURY

After World War II, world leaders sought to learn from the lessons of the past and take President Wilson's dream and turn it into a viable reality.⁹⁶ The result was the United Nations.⁹⁷ Once again, however, at least for a time, the world situation would reduce a potentially viable world-wide organization to relative impotency.

A. The Charter

The United Nations' Charter clearly sets forth the agenda of peace and the prevention of armed conflict. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations."⁹⁸

⁹⁵ While it was formally dissolved on April 18, 1946 it was in reality dissolved long before. De facto it did not exist during or after World War II.

⁹⁶ The victors' harsh actions against the defeated following World War I did much to set the stage for Adolf Hitler's rise to power. Austria and Hungary were separated and much of their land was given to Poland. Germany lost territory in the West, North and East. A huge reparations burden and partial demilitarization were imposed on Germany. Learning from the consequences of these actions, the United States, in 1947, implemented the Marshall Plan (named for Secretary of State George C. Marshall) resulting in aid to European countries in the amount of \$12 billion over the next four years.

⁹⁷ Proposals to establish a World peace organization led to the United Nations Conference in San Francisco from April 25 to June 26 1945. Fifty nations signed the Charter on June 26 and the Charter came into effect on October 24, 1945 upon ratification by the permanent members of the Security Council and a majority of the other signatories.

⁹⁸ UNITED NATIONS CHARTER, ARTICLE 2(4).

The further concept of collective participation is set forth as follows:

"All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining peace and security."⁹⁹ While the Charter clearly sets forth that the United Nations is the primary peacekeeping entity, the concept of self-defense is preserved.

Article 51 of the Charter addresses the right of self-defense. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."¹⁰⁰ There has been a long-standing debate regarding the effect of Article 51 on the right of self-defense.

General consensus has been that Article 51 leaves the right of self-defense unaffected. "No indication that the Charter language was meant to do anything other than reflect the current right of self-defense."¹⁰¹ Even if Article 51 does purport to restrict the right of nations to act in self-defense, nothing prevents states from resorting to the right as it exists under customary international law.¹⁰² To the extent Article 51 and the United Nations Charter provide that the inherent right of self-defense is not impaired, the anticipatory right should stand, as it was customary law before the Charter existed.¹⁰³

⁹⁹ *Id.* at Article 43. The French were the major supporters of Article 43. They believed that it was important for the United Nations to have on call a permanent force supervised by a U.N. general staff. The United States and Britain were opposed to the idea from the beginning, and the committee established to set up the force was unable to make any progress toward a permanent force. The five permanent members of the security council had very little common ground, and the idea for a permanent force was abandoned. FABIAN, *supra* note 3, at 59.

¹⁰⁰ *Id.* at Art. 51.

¹⁰¹ BROWNIE, *supra* note 9, at 271. However, as will be seen, it is the thesis of this article that while self-defense has been preserved it must defer when and if of the United Nations can ensure attaining the same result as self-defense (or possibly even a better result).

¹⁰² *Id.* at 272. By signing the U.N. Charter, however, nations incur certain obligations that may include limiting the self-defense option. In effect, if the United Nations provides a viable alternative that will adequately protect a nation's interests, the "necessity" prong of self-defense is not met.

¹⁰³ *Id.* at 276.

"Unfortunately, there is nothing in the U.N. Charter or in the machinery of the international system which limits the nation's right to determine for itself when an act of aggression has occurred, or whether the regime calling for help is, in fact, the legitimate government."¹⁰⁴ This being the case, in conflicts between China and India, between Pakistan and India and between North and South Korea, for example, *all* the parties mentioned insisted they were acting in self-defense.¹⁰⁵

As signatories to the United Nations Charter, the United States has a treaty obligation to abide by its provisions. There are precursors to the use of force. The United States, like all other members of the United Nations, is obliged to resolve disputes, where possible, through peaceful means.¹⁰⁶ The members have conferred upon the Security Council the responsibility for maintaining international peace and security.¹⁰⁷ To consider action against a state, the Security Council must determine the existence of a threat to the peace.¹⁰⁸ The Security Council should consider, and may decide to use, non-forceful measures such as warnings, public criticism, economic sanctions, or severance of diplomatic relations.¹⁰⁹ If these actions did not or would not obtain satisfactory results the Security Council may employ force to restore international peace and security.¹¹⁰

This system of cooperative and collective self-defense works so long as there is the requisite cooperation and agreement. Security Council action, however, requires concurrence of nine of the 15 members and no veto from any permanent member.¹¹¹ This has resulted in a long history of relative failure.

B. The United Nations During the Cold War

¹⁰⁴ Thomas M. Franck, *Who Killed Article 2(4)? or Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L. L. 809, 818 (1970).

¹⁰⁵ *Id.* at 811.

¹⁰⁶ UNITED NATIONS CHARTER ART. 24.

¹⁰⁷ *Id.*, Art. 25.

¹⁰⁸ *Id.*, Art. 39. For example, when Iraq invaded Kuwait, Security Council Resolution 660 (August 2, 1990), determined there had been a breach of the peace and demanded Iraq withdraw from Kuwait.

¹⁰⁹ UNITED NATIONS CHARTER ART. 41. For example, as a precursor to Desert Storm, Security Council Resolution 661 (August 6, 1990) imposed a total embargo on Iraq.

¹¹⁰ UNITED NATIONS CHARTER ART. 42. Security Council Resolution 678 (November 29, 1990) authorized States to use all necessary means, cooperating with Kuwait, to employ collective self-defense to effect the goals of the earlier Security Council Resolutions.

¹¹¹ UNITED NATIONS CHARTER ART. 27.

During the Cold War, with the notable exception of Korea, the United Nations epitomized stalemate.¹¹² In every significant case, the superpowers canceled each other by using their veto authority as permanent Security Council members. Two examples are discussed below.

On November 6, 1956, Britain, France and Israel invaded Suez after Egypt nationalized the Suez Canal.¹¹³ The area was simply too important strategically to Britain and France for them to permit such an action; they considered the nationalization an assault on a vital national interest.¹¹⁴

All three members of the alliance claimed to be acting in self-defense.¹¹⁵

The subsequent fighting resulted in the Egyptians blocking the canal with sunken and damaged ships.¹¹⁶ Active hostilities lasted about a week, and casualties were rather light. The invaders lost a total of about 250 killed; the Egyptians roughly 2500 killed.¹¹⁷ Advance parties of the United Nations Emergency Force (UNEF) began arriving in Egypt on November 15, 1956.¹¹⁸

¹¹² In the end, even Korea exemplified the concept of stalemate.

¹¹³ "We dug the Canal with our lives, our skulls, our bones, our blood," intoned Egyptian president Nasser in the nationalization speech. Nasser asserted that 120,000 Egyptians died during the digging of the canal; the true figure was closer to 1,400. KENNETH LOVE, *SUEZ: THE TWICE-FOUGHT WAR* 349 (1969).

¹¹⁴ Kay, *supra* note 88, at 264. If determination of a vital national interest is determined by the investment in an area, the claim of both states was well-founded. France's interest in a Suez canal began in the 1790s when the young Napoleon was ordered to cut a canal through the isthmus, but his engineer overestimated the difference in level between the Red and Mediterranean Seas and concluded a canal was impossible. In 1869 Ferdinand de Lesseps completed his 15 year project, and France's dream, by opening the Suez Canal; forty-four percent of the canal, and fifteen percent of the profits, belonged to Egypt. By 1880, in an effort to retire foreign debt, Egyptian monarchs had sold Egypt's share of the canal to Britain, and entitlement to profits to French investors. DONALD NEFF, *WARRIORS AT SUEZ* 15-17 (1981).

¹¹⁵ ARTHUR LEE BURNS & NINA HEATHCOTE, *PEACE-KEEPING BY UN FORCES* 6 (1963). Britain specifically asserted that action was necessary to protect British nationals at risk due to the Egyptian-Israeli conflict. *Id.* at 7.

¹¹⁶ CLARK M. EICHELBERGER, *UN: THE FIRST TWENTY YEARS* 29 (1965).

¹¹⁷ NEFF, *supra* note 113, at 414; HUGH THOMAS, *SUEZ* 151 (1967). Egyptian casualties were largely the result of naval bombardment from the more than 200 British and French warships that engaged in the conflict.

¹¹⁸ NEFF, *supra* note 113, at 422.

UNEF remained in Egypt until 1967. By that time, tensions between the Arab nations, including Egypt, and Israel were even higher, and Nasser asked the United Nations forces to leave.¹¹⁹ Shortly thereafter, the Six Day War began. The United Nations thus played a role in forging a ten year period of relative calm in the Middle East, but was not able to bring a lasting peace to the region.

A few years later, the United Nations took action in the Congo.¹²⁰ The Belgian Congo was the personal possession of Leopold II of Belgium. The area was annexed so that it could be ruled by the Belgian Parliament. The area, with a population of 15 million, gained its independence from Belgium on June 30, 1960. At that time, there were no Congolese doctors, and only one engineer. The Belgians who had administered the government departed. There were also no native army officers.

Almost immediately, the army rebelled against its remaining Belgian officers, and began to loot and to rape Belgian nationals. To protect its nationals, Belgium began to deploy paratroopers in ever-increasing numbers. Government officials appealed to the United States and the Soviet Union; both referred requesters to the United Nations.¹²¹

When the republic was 12 days old, the prime minister appealed to the United Nations for assistance. A United Nations force that peaked at 20,000 troops were sent to the Congo and remained for four years. They withdrew on June 30, 1964, as the Congolese government did not invite them to stay, and both France and the Soviet Union were withholding funding for the operation.¹²²

At the time of the withdrawal, rebels dominated about one-fifth of the country. Further, the United Nations had failed to achieve its most important goal: the proper training of the Congolese army. After the four year period of relative stability, Congo was left in the same sorry shape as when the United Nations arrived.¹²³

¹¹⁹ LOVE, *supra* note 112, at 681.

¹²⁰ To confuse matters, two countries emerging from European administration took the name of Congo. The area north of the Congo River gained its independence from France on August 15, 1960; it took the name of the Congo Republic. The Belgian Congo became the Republic of the Congo, then Zaire, and in 1997 became the Democratic Republic of the Congo.

¹²¹ This was a rare occurrence; neither the United States nor the Soviet Union wanted to block action. In fact, it appears they were glad to have the United Nations to turn to so they could avoid taking the action.

¹²² ERNEST W. LEFEVER, *CRISIS IN THE CONGO* 132 (1965).

¹²³ *Id.* at 133-135.

Despite these difficult situations, the United Nations was able to put together a win. The victory was largely accidental, and required redefining success. That operation was in Korea.

For military and political reasons, the Korean Peninsula was divided at the close of World War II along the arbitrarily chosen 38th parallel. In May 1948, elections were held in the Republic of South Korea, but a Soviet-style state was established in the North. United Nations representatives supervised the election in the South, but were denied access to the People's Republic of Korea.¹²⁴

In January 1950, the Soviet representative walked out of a Security Council meeting in protest over the presence of a delegate from Nationalist China (Taiwan). When the Security Council met on 25 June 1950 to discuss the invasion of South Korea by the North that day, the Soviet delegate was still refusing to attend Security Council meetings.¹²⁵ Although he was informed that a vote on the Korean issue was pending, the Soviet position was that, without their presence, action by the Security Council was illegal. To their dismay, the Security Council voted to support South Korea with armed force, and the resolution was acted upon by the nations of the United Nations.¹²⁶

Without U.N. action, South Korea would certainly have perished. Effective U.N. action meant that, after a grueling conflict, the 38th parallel was reestablished as the border between the two nations. An armistice ended active hostilities, but officially, a state of conflict exists to this day. Victory meant stalemate for the Cold War United Nations. And, thus, even in the one instance where United Nations activity progressed beyond the stalemate of the "dueling vetoes," the ultimate outcome was the same.

VIII. THE POST COLD WAR UNITED NATIONS

A. The Chapter VII Process

With the polarity of the positions held by the Soviet Union and the United States, the post-World War II world did not set the stage of United Nations successes. The Cold War put two permanent members of the Security Council at direct odds and stalemated the Council. Laudable goals were unattainable with the divergent political agendas of the two super-powers.

¹²⁴ CORNELIA MEIGS, *THE GREAT DESIGN* 155 (1964).

¹²⁵ *Id.* at 156. North Korea "struck like a cobra" in the words of Douglas MacArthur. Before forces in the South could react, there were 90,000 North Korean troops south of the 38th parallel. WILLIAM MANCHESTER, *AMERICAN CAESAR* 545 (1978).

¹²⁶ MEIGS, *supra* note 123, at 157. The resolution called upon member nations to render the assistance to the Republic of Korea necessary to repel the armed attack and to restore international peace and security to the area. MANCHESTER, *supra* note 124, at 545.

Peace was not maintained. "In many cases - Vietnam was the outstanding case - the conflict was not dealt with at all in the Security Council."¹²⁷ Regarding the maintenance of peace:

[T]he United Nations failed in many respects. Some wars did not occur after United Nations activity, which might have broken out without that intervention. But many wars, international and internal wars, did take place. In the first 30 years of the United Nations about 25 international wars and about a hundred civil wars took place. They brought about as many casualties as World War II.¹²⁸

With recourse to the Chapter VII process unavailable,¹²⁹ during the past fifty years we have had no choice but to resort to actions pursuant to Article 51.

B. Post Cold War United Nations

Given the fact that most nations, including the Super Powers, are members of the United Nations, there are two general bases for legally justifying the use of international force in today's world. One has been previously discussed at length; actions taken by one or more nations in self-defense pursuant to Article 51 of the United Nations Charter.¹³⁰ The second, which we will now discuss as the current option of choice, is the employment of United Nations enforcement actions under Chapter VII of the Charter.¹³¹

In recent times, there has been sufficient unanimity for an effective Security Council and United Nations. Jim Terry notes:

¹²⁷ U.N. LAW / FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW 27 (A. Cassese ed. 1979)

¹²⁸ *Id.*

¹²⁹ Chapter VII of the United Nations Charter provides for the employment of U.N. enforcement actions.

¹³⁰ See generally, ARMY TJAG OPERATIONAL LAW HANDBOOK JA 422, CHAPTER 4, LEGAL BASES FOR MILITARY OPERATIONS (1996).

¹³¹ *Id.*

Prior to the dissolution of the Soviet Union in 1991 and the 1989 Tiananmen Square massacre in China, an ideological schism existed in the Security Council that divided the Council's five members along communist/capitalist lines. However, since these events, Russia's dependence on the U.S. for financial assistance and China's desire to protect its newly gained Most Favored Nation status have resulted in a pragmatic determination on the part of these states to support Security Council peace operations, at least for the present.¹³²

While we concur with the above, we also assert that the United States and the Russian Federation (like its predecessor, the Soviet Union) often have similar interests (e.g., petroleum) in the Middle East which promote working together to a common end. Further, neither the U.S. nor Russia has exceptionally strong ties to any of the middle-eastern states.¹³³

The successful cooperative efforts of Desert Storm,¹³⁴ the humanitarian relief efforts in Somalia,¹³⁵ and the multinational force deployed to facilitate "the restoration of the legitimate authorities of the Government of Haiti, and to maintain a secure and stable environment"¹³⁶ are examples of success stories. The Council, once "immobilized by reciprocal vetoes," is in "the present situation ... working 'as it was supposed to work' according to the design of the framers."¹³⁷

¹³² James P. Terry, *U.N. Peacekeeping and Military Reality*, 3 BROWN J. OF WORLD AFF. 135 (1996) (Citation omitted). See James P. Terry, *The Criteria for Intervention: An Evaluation of U.S. Military Policy in U.N. Operations*, UNIV. OF TEXAS J. INT'L. L. (Winter 1995)

¹³³ The unique U.S. - Israel relationship is the exception.

¹³⁴ Security Council Resolution 678

¹³⁵ Security Council Resolution 794 (authorizing "all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia"). In the end, the Somalia operation may not have been considered a success. It did, however, indicate that collective action was possible in situations in which individual nations would not be able to act.

¹³⁶ Security Council Resolution 940.

¹³⁷ Abram Chayes, *The Use of Force in the Persian Gulf*, paper prepared for the U.S.-Soviet Conference on the Non-Use of Force, October 4-6, 1990, at 9.

Desert Storm was a clinic in how successful a Chapter VII United Nations endeavor can be. When there is a breach of the peace requiring outside intervention¹³⁸ as in the case of the Iraqi invasion of Kuwait, the United Nations Security Council can issue a Resolution stating that there has been a breach of the peace and demanding specific action. In Desert Storm the Security Council did so and demanded that Iraq withdraw from Kuwait.¹³⁹ When this Resolution did not produce the desired result of Iraqi withdrawal, the Security Council imposed a total embargo on Iraq.¹⁴⁰ When this did not accomplish the mission, the Security Council authorized the interception and boarding of vessels proceeding to or from Iraq.¹⁴¹

When necessary, the Security Council may authorize States to "use all necessary means" to effect the mission.¹⁴² In the case of Iraq, the Council did so, and the result was Desert Storm.¹⁴³

C. Chapter VII's Superiority over Article 51

Article 51 is not a grant of authority to engage in self-defense, rather it is the recognition of an inherent right not precluded by the Charter.¹⁴⁴ The exercise of this right is only proper when there is no other suitable option. Article 51 specifically, "Nothing in the Charter shall impair the inherent right of ... self-defense ... until the Security Council has taken the measures necessary to maintain international peace and security."¹⁴⁵ So, arguably, absent an emergency situation, actions pursuant to Article 51 are not proper where the Chapter VII option is available. It is clearly the intent of the Charter, to which the United States is a party, that the United Nations be the primary peace-keeping entity.¹⁴⁶

A second reason for using Chapter VII rather than Article 51 is politics. As a practical matter, any decision to use military force must be justified in order to gain domestic and international support. Or, at least, to

¹³⁸ The United Nations is not authorized to intervene in essentially domestic matters. U.N. Charter art. 2, para. 7. Saddam Hussein argued unsuccessfully that the invasion of Iraq was merely the re-acquisition of a renegade province and a domestic matter.

¹³⁹ Security Council Resolution 660 (August 2, 1990).

¹⁴⁰ Security Council Resolution 661 (August 6, 1990).

¹⁴¹ Security Council Resolution 665 (authority to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destination to ensure strict implementation of Resolution 661).

¹⁴² See, e.g., Security Council Resolution 678 (November 29, 1990).

¹⁴³ *Id.*

¹⁴⁴ Chayes, *supra* note 136, at 7.

¹⁴⁵ UNITED NATIONS CHARTER ART. 51; Chayes, *supra* note 136, at 7-8.

¹⁴⁶ UNITED NATIONS CHARTER ART. 24.

avoid unacceptable international opprobrium. The Vietnam war is the consummate example of the impact a negative domestic climate can have on a war effort.

The United States went to considerable effort to justify international action in the name of national self-defense in the case of the its "defensive" strikes of 15 April 1986 on Tripoli and Benghazi.¹⁴⁷ The United States needed the support of Britain, and sought the support of France and Spain. In the delicate balance of the Cold War, the U.S. wanted to minimize the reaction of the Soviet Union, and wanted the strikes to "play well" in the United States.

Looking back to Desert Storm, unilateral action would not have been possible. The United States needed the team that was built. Not just for the cumulative might, but also for the logistical support and flexibility the coalition offered.

Saudi Arabia provided a place from which to prepare and wage war. Overflight permissions and monetary contributions from the Middle Eastern nations were vital. Perhaps most importantly, the U.S. needed to ensure other Middle Eastern countries supported the United States-led effort and did not side with their sister-state, Iraq. Future conflicts could demand that the U.S. again form a comparable consortium.

Actions pursuant to a Security Council Resolution are less encumbered than Article 51 actions. To use Article 51, United States action must be in defense of the United States or its citizens, it must be necessary, as established by exhaustion of lesser alternatives, it must be proportional to the threat and no greater in effect than required, and it must not be otherwise prohibited.¹⁴⁸ One could argue that the Chapter VII process, in large part, encompasses these same concepts. But, we contend that the requirements are less stringent and that in an action where there is international consensus there would be far less scrutiny than in a unilateral action.

On a related parameter, there is strength in numbers. Both with regard to resources and politics. A state acting alone is readily open to criticism from those in political opposition to either the action or the state. But, there is "strength in numbers." In a coalition effort there will be a synergy that will reduce any opposition to the action, and the larger number of participants, with shared responsibility for the actions, makes criticism of any given state less likely. And, should there be criticism it will carry far less weight.

We must recognize that:

¹⁴⁷ Terry, *supra* note 47, at 184-85. The United States had to justify the bombing of a foreign state for actions taken, and which might be taken in the future, by terrorists abroad against U.S. citizens. This was not a response to a threat to the United States as a nation or within its territorial boundaries.

¹⁴⁸ *Id.* at 184.

We cannot remain isolated from threats to our interests or from these crises; nor should we become the world's policemen. Therefore, we should rely on means of addressing these types of conflicts, other than unilateral - including ad hoc coalitions, regional organizations such as NATO, and U.N. peace operations.¹⁴⁹

IX. NEW CHALLENGES

Desert Storm was an unqualified success.¹⁵⁰ And this was, in large part, a function of the leadership provided by the United States and the nature of the mission. This was a relatively traditional war-fighting military operation as opposed to the peace-keeping mission and military operations other than war. However:

{The} lack of a cohesive effort by forces in the U.N. Operation in Somalia (UNOSOM) II and the failure of the United Nations Protection Force UNPROFOR in Bosnia, to prevent ethnic cleansing, border relocations, or disruptions in the food distribution program, let alone the continued fighting between the parties have raised serious concerns over the U.N.'s ability to effectively participate in operations where "all necessary means" are authorized.¹⁵¹

So, while there is an exciting new option available to the members of the United Nations to resolve international disputes, as with any new process, there will be growing pains and lessons learned.¹⁵²

¹⁴⁹ James P. Terry, *The Evolving U.S. Policy for Peace Operations*, 19 SO. ILL. U.L.J. 119, 121 (1994).

¹⁵⁰ Although some might argue that this is not the case as United States-led coalition forces did not proceed to Baghdad and Saddam Hussein is still in power. The U.S. leadership asserted, however, that leaving Baghdad and the Iraqi political situation in place was a calculated decision taken to avoid creating a power vacuum in the Middle East similar to the one in Eastern Europe following World War II.

¹⁵¹ Terry, *supra* note 147, at 135.

¹⁵² These include actions under Chapter VI of the United Nations Charter: the peaceful settlement of international disputes. With situations that go beyond peacekeeping but stop short of actual combat, and informal term "Chapter Six-and-a-Half" has emerged to describe demobilization, conflict prevention, actions to guarantee freedom of movement, etc. KENNETH ALLARD, SOMALIA OPERATIONS: LESSONS LEARNED 4 (1995)

The United Nations is the entity in charge of world-wide peace-keeping. However, it is a derivative entity. That is, its power stems from its associated member-states. It does not have independent war-fighting or peace-keeping capability. The United Nations will provide the central coordination and authority for certain actions deemed appropriate. But the accomplishment of the missions will require judicious use of the available resources. This may include, as we have seen in Bosnia, use of regional organizations such as NATO - organizations and "states with a regional interest may be better equipped to respond, in coordination with, and after Security Council approval under Chapter VII."¹⁵³

We have seen the growing pains attendant to the evolution in the United States to joint war-fighting. To ensure centralized operational command and the proper prioritizing of resources it makes sense to have a unified combatant commander in charge of operations. However, the natural resistance to change and parochial interests of the individual services have presented challenges.

As we evolve into an era of United Nations led and authorized operations, these same challenges exist and are exponentially greater. They are superimposed on the still developing joint world in the Department of Defense. They involve not just multi-service issues, but multinational issues. These are compounded by differing languages and cultures. The U.S. will need multinational training and planning. It will need clearly defined goals and limits.¹⁵⁴

¹⁵³ Terry, *supra* note 131, at 143. While the final outcome in Bosnia is yet to be determined, it manifests the difficulties attendant to the Chapter VII process in assembling a force that is properly structured to be militarily capable in any given situation.

¹⁵⁴ We need to be sure not to bite off too much; not to get involved in actions that are inappropriate (*e.g.*, nation building). ALLARD, *supra* note 151, at 89-94.

For a national action to be successful there must be "effective means for commanding, controlling coordinating and communicating with multinational forces."¹⁵⁵ Learning from the problems in Somalia, the administration issued Presidential Decision Directive 25¹⁵⁶ which provides a careful analysis of those factors most relevant in determining whether, when, and to what degree the United States should participate militarily in international operations.¹⁵⁷ However, the issue is not whether the U.S. should participate in international actions or whether its participation should be under the auspices of the United Nations. We contend that the answer to both of these is a resounding "yes!"¹⁵⁸ We merely need "to ensure that the operation to which we have committed forces is effective, well led, and is operating within appropriate rules of engagement."¹⁵⁹

X. CONCLUSION

[W]ar has been used as an instrument against criminal aggression as much as it has been the instrument of aggression itself. It has played a beneficent role in history as well as a criminal one. Where would [the United States] be now, or for that matter any other civilized nation, if it had not met oppression with force and asserted its determination to maintain as against the world those institutions which embody its political career?¹⁶⁰

Armed conflict is inevitable given human nature. Whether it be "in the name of the Father," or based on some other political or national objective, it will occur. The issue is the reaction to aggression. How can issues of conflict best be resolved?

Over time self-defense evolved as the acceptable rationale for participation in armed conflict. This has been in large part a consequence of the inability of the community of nations to respond adequately to aggression.

¹⁵⁵ ALLARD, *supra* note 151, at 91.

¹⁵⁶ See Bureau of International Affairs, U.S. Department of State, Pub. No. 10161: The Clinton Administration Policy on Reforming Multilateral Peace Operations (1994) (discussing classified Presidential Decision Directive 25: Reforming Multilateral Peace Operations (4 May 1994).

¹⁵⁷ Terry, *supra* note 131, at 137.

¹⁵⁸ We are not unmindful that a change in world politics might yield a circumstance where once again the United Nations is reduced to stagnation. For example, China has a permanent seat on the United Nations Security Council, and thus has a permanent veto. In the event of a need for United Nations involvement regarding Taiwan, China might stalemate the organization. For a discussion of Sino-U.S. relations, see RICHARD BERNSTEIN & ROSS H. MUNRO, THE COMING CONFLICT WITH CHINA (1997).

¹⁵⁹ Terry, *supra* note 131, at 137.

¹⁶⁰ JAMES T. SHOTWELL, WAR AS AN INSTRUMENT OF NATIONAL POLICY 15 (1929).

The efforts undertaken by world and regional organizations are a history of failure and stalemate. Times have changed, however.

The United Nations is now able to engage effectively in deterrence, peacekeeping and war-fighting. This being the case, because of their obligations as United Nations members, and because it is the best course of action, nations must defer exercise of their rights of self-defense to collective, effective organization-led actions.

When applied justly, collective force is an effective and proper response to international aggression. With the United Nations finally coming into its own, the time is ripe for the nations of the world to conduct such actions under the auspices of that organization.

INTERNATIONAL LAW REGARDING PRO-DEMOCRATIC INTERVENTION: A STUDY OF THE DOMINICAN REPUBLIC AND HAITI

Major D.J. Lecce*

INTRODUCTION

Since the Wilsonian era in American history, the United States has engaged in military intervention in foreign sovereigns based on democratic grounds. The United States justified these interventions on altruistic and humanitarian reasons, but history reveals the truer rationale for these operations was maintaining American national security interests. This premise is specifically applicable to the United States' intervention in the Western Hemisphere.

This paper explores the history and law regarding the United States' pro-democratic interventions by studying the Dominican intervention in 1965 and the Haiti intervention in 1994. Although there are many similarities between the two operations, the differing foreign policy approaches taken in each makes the Dominican intervention suspect under international law, while the Haiti intervention has been hailed as a breakthrough for struggling democratic governments.

This paper first discusses the history of the Dominican Republic and Haiti. Each intervention's factual nature will be explored, followed by the application of accepted international legal norms to each case. The paper then endeavors to analyze each intervention by applying the law - and the foreign policy factors impacting the law. Finally, the paper presents international law regarding pro-democratic intervention as a fluid set of principles often molded by factors outside the letter of the law.

HISTORY OF THE DOMINICAN REPUBLIC AND HAITI

In many ways, Haiti and the Dominican Republic share a common history. Christopher Columbus discovered the island of Hispaniola, occupied by Haiti and the Dominican Republic, on December 5, 1492. In the mid-1600's French pirates captured the western part of Hispaniola, known as St. Dominque, and renamed it Haiti.¹ Both countries' populations derive from

* United States Marine Corps Judge Advocate. B.A. (1984), J.D. (1987) University of Pittsburgh, LL.M. (International and Operational Law Specialty 1997) The Judge Advocate General's School, United States Army. Prior duties include trial counsel, 1st and 3d Force Service Support Groups, Civil Law Attorney, Marine Corps Base, Camp Pendleton, Staff Judge Advocate 31MEU(SOC), Assistant Professor of Military Law, U.S. Naval Academy. Currently assigned to the Legal Services Support Section, 1st Force Service Support Group.

¹ MAJOR LAWRENCE M. GREENBURG, ANALYSIS BRANCH, U.S. ARMY CENTER OF MILITARY HISTORY, UNITED STATES ARMY UNILATERAL AND COALITION OPERATIONS IN THE 1965

International Law Regarding Pro-Democratic Intervention

descendants of slaves brought from Africa before the 19th century to work on Spanish and French plantations. In 1790, there were slightly more than a half-million people on Haiti; 452,000 were slaves, 40,000 were white Europeans and 28,000 *gens de couleur* or mulatto.²

In 1791, Haitian slaves revolted against their French plantation owners. The French freed the Haitian slaves. The nation remained under French control, however, until 1804, when the Haitian revolutionary General Jean Jaques Dessalines proclaimed victory over French occupation.³ "Dessalines initiated what became a legacy of terror in Haiti by leading a post-independence massacre of French citizens remaining on the island. By the end of the Haitian revolution, Haiti's plantation system was nearly destroyed, and the Haitian economy lay in ruins."⁴ General Dessalines' rule marked the beginning of an almost continuous line of despotic heads of state in both Haiti and the Dominican Republic.

The Dominican Republic essentially remained under Spanish control, at the request of plantation owners, until 1821. In December 1821, Juan Nunez de Caceres seized the Dominican government and declared the country independent. In January 1822, Haiti invaded and conquered the new republic in less than thirty days. In 1844, the Dominican Republic finally achieved independence from Haiti.⁵

Although Hispaniola has come under the United States sphere of influence since the Monroe Doctrine's proclamation in 1823,⁶ American

DOMINICAN REPUBLIC INTERVENTION, at 3 (Washington D.C.: U.S. Army Center of Military History 1987).

² Sidney W. Mintz, *Can Haiti Change?*, 74 FOREIGN AFFAIRS 73, 76 (Jan/Feb. 1995).

³ *Id.* at 77.

⁴ John C. Pierce, Note, *The Haitian Crisis and the Future of Collective Enforcement of Democratic Governance*, 27 LAW & POL'Y INT'L BUS 477, 480 (1996).

⁵ The Haitian invasion of the Dominican Republic in 1822 marked the first of numerous incursions by the Haitians that lasted well into the 20th century. GREENBURG, *supra* note 1, at 3.

⁶ The interest of the United States in the Latin American region has grown primarily from U.S. national security interests since the announcement of the Monroe Doctrine in 1823. Paradoxically, however, the United States government showed general indifference to the Latin America until the Spanish-American War in 1898. During the period before the Spanish-American War, "U.S. policy regarding intervention in Latin America is probably best characterized as the use of force for the protection of life and property of American citizens, but not for the enforcement of international financial obligations of the Latin American states." There are three exceptions to U.S. non-intervention in Latin America from the 1820's until after the American Civil War: annexation of the Mexican territory as part of the nation's westward expansion labeled "manifest destiny;" blocking British influence in Cuba, and; the signing of the Mallarino-Bidlack Treaty of 1846 with Colombia, protecting U.S. interests in the Isthmus of Panama that fell under Colombian sovereignty at the time. WILLIAM EVERETT KANE, *CIVIL STRIFE IN LATIN AMERICA: A LEGAL HISTORY OF U.S. INVOLVEMENT* 34-45 (Baltimore: Johns Hopkins University Press 1972).

intervention on the island did not occur until after the American Civil War. In 1869, President Ulysses S. Grant ordered the United States Marines to the island for the first time. Pirates had been harassing American shipping from bases in Haiti and the President ordered it stopped. The Marines nearly controlled the entire island when the Dominican head-of-state offered to sell the country to the United States for \$100,000 in cash and \$50,000 in armament credits.⁷ Although President Grant supported the deal, it failed to pass Congress.⁸

United States military intervention occurred again in 1905 under President Theodore Roosevelt's Monroe Doctrine "Corollary."⁹ On this

⁷ GREENBURG, *supra* note 1, at 3-4.

⁸ United States interventionist strategy in the Caribbean escalated in the late-19th century with technological advances in naval power and the publication of Alfred Thayer Mahan's, *The Influence of Sea Power Upon History*. Mahan, more than a naval enthusiast, was a geopolitical theorist. Mahan argued that national power and security were dependent on the ability of a nation to develop international commerce through use and protection of the seas. This meant not only control of commercial shipping routes, but control of the high seas in the areas of commerce. Further, because the majority of warships at the turn of the century were steam powered, the need for coaling stations away from America's shores was obvious.

The onset of the Spanish-American War in 1898 was the primary catalyst for the development of U.S. interventionist strategy in the Caribbean region. By the 1890's America "recognized that continued control of Cuba [and Puerto Rico] by a European power, especially a weakened power, would not only have endangered the continental United States but also would have made secure American control of isthmian communications impossible." The weakened military power of Spain was of specific concern to U.S. strategists in light of the imperialistic intentions of Germany's Wilhelm II and the his expanded navy. With the explosion of the American battleship *Maine* on February 15, 1898 in Havana harbor, the Spanish-American War began in earnest.

President McKinley's Spanish-American War message to Congress contained references to "humanitarian concerns" and the protection of life and property of U.S. citizens. However, primary importance was given to the fact that existing conditions in Cuba constituted "a constant menace to our peace" and required the United States to continuously remain on a "semiwar footing" at an "enormous expense" to the government. Similar concerns would be the basis for U.S. intervention in the Dominican Republic in 1965 and Haiti in 1994.

The war ended with the signing of the Peace of Paris in December 1898. The American desire to acquire naval bases in the Pacific and Caribbean was apparent in the Treaty. Spain ceded the Philippine Islands, Guam, and Puerto Rico to the United States for a payment of \$20 million and Cuba was to be placed under American trusteeship. However, it was the Platt Amendment to the Cuban Constitution of 1902 that solidified U.S. control of the region. The Platt Amendment assured the United States the right to intervene for purposes of its own defense, including the right to establish U.S. naval bases on the island.

The Spanish-American War assured United States hegemony in the Caribbean Region. Maintenance of American domination of the Western Hemisphere would drive U.S. foreign policy toward Latin America through the 20th century. The attainment of American possessions in the Caribbean and the Pacific after the War with Spain highlighted Mahan's theory that America's naval power needed to be supported by naval and coaling stations abroad, and required the rapid deployment of vessels from the Atlantic to the Pacific and vice versa. Further, the need for an isthmian canal became more immediate. KANE, *supra*, note 6, at 45-48, 63.

⁹ The Roosevelt administration finalized the near-total U.S. control of the region by establishing the Caribbean naval squadron in 1902. "The Caribbean, so far as the navy was concerned, had to remain an 'American Lake.'" Finally, in 1904, under the threat of European intervention in the Dominican Republic to collect unpaid national debts, President Roosevelt formally announced

International Law Regarding Pro-Democratic Intervention

occasion, the United States moved to check a threatened European intervention to collect unpaid Dominican debts.¹⁰ The United States seized the Dominican customs house to begin proper administration of the Dominican foreign debt. "Forty-eight percent of the customs duties received went to the Dominican government, with the United States Navy Department using the remaining 52 percent to repay foreign debts."¹¹

In 1916, President Woodrow Wilson again dispatched the United States Marines to both Haiti and the Dominican Republic to "quell domestic violence and economic chaos."¹² More importantly, the United States military was ordered to again take control of the customs houses to ensure foreign debt repayment. Continued German-American antagonism and the outbreak of war in Europe made this intervention especially urgent. While the United States' occupation of the Dominican Republic lasted until 1924, the occupation of Haiti continued until 1934.¹³ American receivership of the Dominican customs house continued until 1941.¹⁴

THE DOMINICAN INTERVENTION 1965

In 1924, the eight-year occupation of the Dominican Republic by American military forces came to an end. The United States' "good neighbor" policy established by Franklin Delano Roosevelt¹⁵ would remain intact through the end of the Second World War. The dawn of the Cold War and American anti-Communist fears resurrected United States' interventionist strategy in the

United States policy in the region. This policy was to be known as the "Roosevelt Corollary," reiterating the Monroe Doctrine of 1823 and establishing the United States as the sole power possessing the right to unilateral intervention in Latin America. *Id.* at 45-49.

¹⁰ As was accepted state practice of the time, the Hague Court in 1904 upheld the right of blockade and armed intervention to repay national debts. *Id.* at 63.

¹¹ GREENBURG, *supra* note 1, at 4.

¹² *Id.* at 4.

¹³ Pierce, *supra* note 4, at 480.

¹⁴ ABRAHAM F. LOWENTHAL, *THE DOMINICAN INTERVENTION*, 9 (Cambridge Mass: Harvard University Press 1972).

¹⁵ After World War I, the dominance of American military power in the Western hemisphere was unquestioned. Due to the unchallenged hegemony of the United States at this time, American diplomats began liquidating the system of American protectorates in the Caribbean. By 1922, the U.S. policy of preemptive action in Latin America to discourage European imperialism was no longer necessary. There was no one to preempt. In 1933, President Franklin D. Roosevelt was able to announce his noninterventionist "good neighbor" policy with America's southern neighbors. FDR publicly announced: "The definite policy of the United States from now on is one opposed to armed intervention...The maintenance of law and the orderly processes of government in this hemisphere is the concern of each individual nation within its borders first of all. It is only if and when the failure of orderly processes affects the other nations of the continent that it becomes their concern, and the point to stress is that in such an event it becomes the joint concern of the whole continent in which we are all neighbors." KANE, *supra* note 6, at 98, 124.

region. The United States' fear that communist influences could impact every nation of the world reached a fervor pitch upon Castro's takeover of Cuba in 1960. With reference to Latin America, Senator Dodd wrote in 1965: "In the long run, communism aims to subjugate the world, and we should not refrain from reminding ourselves that, by its own words and deeds, the international Communist movement is a world conspiracy."¹⁶

Against this anti-Communist backdrop, the 1965 Dominican intervention took place. General Rafael Trujillo took the Dominican Republic presidency in 1930, ascending through the ranks of the national police. Trujillo ruled the country ruthlessly and became one of the most graphic examples of a subversive dictatorship in Latin America.¹⁷ However inhumane, Trujillo brought coerced stability to the Dominican Republic,¹⁸ greatly reducing the threat of foreign intervention in the Caribbean region before and during World War II. "As President Roosevelt is said to have remarked, Trujillo may have been an S.O.B., but 'at least he's our S.O.B.'"¹⁹

Just as it supported the subversive Batista regime in Cuba, the United States supported the similarly subversive, but anti-Communist, Trujillo in the Dominican Republic. In the 1960's, the United States was simply more concerned with stability than fulfilling democratic ideals. If stability meant supporting dictatorial regimes, the United States supported such regimes.²⁰

Castro's relatively easy displacement of Batista in Cuba forced the United States to re-evaluate its support of the Trujillo regime. In 1960, the United States supported an Organization of American States (O.A.S.) Human Rights Commission²¹ investigation of human rights violations in the Dominican

¹⁶ *Id.* at 169.

¹⁷ GREENBURG, *supra* note 1 at 5.

¹⁸ There had been 123 political heads of state in the Dominican Republic since its independence in 1844. *Id.* at 4.

¹⁹ LOWENTHAL, *supra* note 14, at 24.

²⁰ KANE, *supra* note 6, at 153.

²¹ The Charter of the Organization of American States (O.A.S.) was established at the Bogota Conference of 1948. The O.A.S. served the national interests of the United States and Latin American nations in the Cold War era. "The Latin Americans remained intensely concerned with their national sovereignties and with protecting themselves both from on another and from the United States. The United States was introducing the paeon of anti-Communism that was to remain the central theme of U.S. foreign policy for the next decade and beyond."

For the Latin American nations, the O.A.S. Charter provided for non-intervention into a nation's internal or external affairs through armed force or any other form of interference. The O.A.S. Charter also provided for collective sanctions for violation of its provisions. For the United States the charter provided an additional mechanism for stability in the hemisphere. Perhaps, more importantly, however, the O.A.S. gave the U.S. a mechanism to bypass the United Nations Security Council to intervene the Caribbean region. The latter feature of the O.A.S. charter becomes especially important when studying the Dominican intervention.

In the short run, the establishment of the O.A.S. marked a shift in US policy away from gunboat diplomacy in the Caribbean region, to one of a more tolerant "good neighbor." Of course, the US would abandon its "good neighbor" policy to unilaterally intervene in the

International Law Regarding Pro-Democratic Intervention

Republic. The Commission found "flagrant and numerous violations of human rights" against citizens of the Dominican Republic by the Trujillo regime.²² The United States' withdrawing support for Trujillo precipitated his assassination in May 1961.²³

Trujillo's death resulted in a power vacuum in the Dominican government. The reigns of the Dominican government would change hands six times between May 1961 and April 1965 - twice through military coups.²⁴ In September 1963, General Elias Wessin y Wessin seized control of the government via military coup. Wessin y Wessin established a three-man junta headed by former Dominican foreign minister, Donald Reid Cabral.²⁵

On April 24, 1965, junior military officers began a coup against the Reid junta. The impetus for the coup was less democratic struggle, and more a recognition that the senior Dominican military leadership was not going to relinquish power anytime in the near future. Further, it was apparent that Reid was not going to permit fully democratic elections as scheduled in the fall of 1965. The rebel forces operated under the Dominican Revolutionary Party (DRP) banner, supporting the return of the recently deposed Bosch from exile in Puerto Rico. Reid's government collapsed on April 25, 1965. Reid's downfall was due mainly to the loyalist Dominican military's refusal to support him.²⁶

The United States' decision to intervene militarily in the Dominican Republic was motivated chiefly by evidence that communist-oriented political parties were influencing the DRP.²⁷ Dominican Air Force Colonel Pedro

Dominican Republic in 1965. This is due, in part, because the O.A.S. lacked any enforcement mechanism in the 1960's. However, the O.A.S. provided a forum for at least minimum process where Latin American nations to voice their concerns in regard to US unilateral action and move for a multilateral O.A.S. force to intervene in the crisis.

In the long run, the OAS has been a mechanism assisting the Latin American nations to "more equal" neighbors to the US. With the passage of the Santiago Declaration in June 1991, the OAS has given teeth to the enforcement of democratic legitimacy of governments in the region. The Declaration commits the OAS to act collectively "in the event of any occurrences giving rise to the sudden or irregular interruption of democratic political institutional process or the legitimate exercise of power by the democratically elected government in any of the Organizations member states." The Santiago Declaration would be utilized collectively in the 1994 Haiti intervention. KANE, *supra* note 6, at 157.

²² GREENBURG, *supra* note 1, at 6.

²³ One commentator asserts that the U.S. government encouraged the assassination of Trujillo; however, such a position has no empirical support. LOWENTHAL, *supra* note 14, at p. 25. See also, GREENBURG, *Supra* note 1, at 6.

²⁴ The events which led to the 1965 U.S. intervention began with the election of Juan Bosch, a social democrat, to the Dominican presidency in December 1962. Bosch's liberal policies legalized Dominican Communist parties.

²⁵ GREENBURG, *supra* note 1, at 8-9.

²⁶ *Id.* at 16.

²⁷ *Id.* at 14.

Bartolome Benoit led the loyalist military junta opposing the DRP. Benoit, realizing the loyalist force's desperate situation at the hands of the rebels, requested from the U.S. ambassador the landing of 1,200 Marines "to help restore order to the country."²⁸

By April 28, 1965, President Johnson decided to unilaterally intervene in the Dominican Republic. President Johnson's fear of a "second Cuba" drove this decision. The problem facing the President and his advisors was a method in which to justify unilateral intervention by the United States. Military "intervention to 'restore order' and prevent a communist victory would almost certainly involve the United States in openly pro-loyalist activities likely to be condemned through out the hemisphere as a return to gunboat diplomacy in support of a military regime."²⁹ To get over this obstacle, the President publicly presented the intervention as humanitarian, designed to protect American nationals in the Dominican Republic. The President's advisors required an explicit written statement from Benoit to the American embassy requesting intervention based on the threat of danger to American citizens.³⁰

On the evening of April 28, 1965, five hundred thirty-six (536) Marines from the 6th Marine Expeditionary Unit (MEU) under the command of Colonel George W. Daughtery went ashore.³¹ By the next day, Benoit's junta regained control of Santo Domingo. By April 29, 1965, the first elements of the Army 82d Airborne Division landed at San Isidro Airfield in Santo Domingo. Military operations in the Dominican Republic encompassed three distinct phases. First, the 6th MEU supported by a naval task force evacuated civilians. Second, the 82d Airborne Division conducted "stability operations"³² from April 30 to May 3. Heavy fighting between the Dominican rebels and American forces often marked this phase. Finally, the operation was turned over to an OAS Inter-American Peace Force on May 28, 1965.³³

The Johnson administration's policy goals in the Dominican Republic were, in order of importance, "to prevent the establishment of another radical Castroite government; to establish a stable, democratic, and strongly anti-Communist regime; and to pressure the Organization of American States into

²⁸ LAWRENCE A. YATES, COMBAT STUDIES INSTITUTE, U.S. ARMY COMMAND AND STAFF COLLEGE, POWER PACK: U.S. INTERVENTION IN THE DOMINICAN REPUBLIC, 1965-1966, 48 (Levenworth Papers, no. 15)(Fort Levenworth, Kan: Combat Studies Institute 1988).

²⁹ *Id.* at 50.

³⁰ *Id.* at 50.

³¹ *Id.* at 53.

³² "Stability Operation" is a term of art finding its origins in U.S. Army lexicon. As used in the Dominican intervention, "stability operation" was defined by General Harold K. Johnson, chief of staff of the U.S. Army, as follows: "Operations designed to help a country attain its legitimate aspirations in an atmosphere of tranquillity." *Id.* at 73.

³³ GREENBURG, *supra* note 1, at 31.

International Law Regarding Pro-Democratic Intervention

creating the machinery for collective action against Communist or radical dictatorial expansion in the region."³⁴

Ultimately, President Johnson achieved his goal - preventing a "second Cuba" through the unilateral use of military might. The United States adeptly side-stepped an almost certain Soviet veto of any United Nations resolution authorizing an enforcement action in the Dominican Republic by gaining OAS jurisdiction over the operation.³⁵

Free elections were held in the Dominican Republic in 1966. The last American forces withdrew in September 1966. The operation cost the United States 219 casualties (27 killed in action, 20 non-combat deaths, and 172 wounded in action). United States' financial expenditures were \$311 million.³⁶

The Johnson administration suffered great political damage by ordering the Dominican intervention.³⁷ The United States lost trust among Latin American nations that the United States would adhere to the norm of non-intervention in international law.³⁸ Worse, the intervention lacked the support of the American public. "Although 76 percent of the American population initially supported the Marine evacuation operation, less than half supported introduction of the Army."³⁹ The Johnson administration's failure to establish any credible link between the Dominican rebels and communist organizers⁴⁰ was the beginning of the loss of presidential credibility in foreign affairs.⁴¹ The Johnson administration's loss of foreign policy credibility reached its apogee with the Vietnam War's escalation.

HAITI INTERVENTION 1994

³⁴ *Id.* at 24-25.

³⁵ KANE, *supra* note 6, at 217. Arts. 52 & 53 of the UN Charter allows regional "arrangements or agencies" to take action in limited circumstances.

³⁶ GREENBURG, *supra* note 1, at 84-85.

³⁷ The final outcome of U.S. intervention in the Dominican Republic was mixed. The Johnson administration achieved its goal of preventing a rebel take-over of the country. Further, the OAS revealed that its member nations had the will and resources to form an effective multi-lateral force. The fact that the OAS was "forced into action by the US unilateral military intervention or that the peace force was predominantly American is of little consequence. The perception of OAS action existed, and in international politics, perceptions often carry as much weight as fact." GREENBURG, *supra* note 1, at 93.

³⁸ KANE, *supra* note 6, at 217-218.

³⁹ GREENBURG, *supra* note 1, at 26.

⁴⁰ The only evidence of a communist link were two CIA lists naming "Current Rebels who had Cuban Training" and "Rebels who are known Leftist Activists." These lists proved to be grossly inaccurate. *Id.* at 25.

⁴¹ *Id.* at 26.

In an effort to end Haiti's history of undemocratic elections,⁴² the O.A.S., in conjunction with the United Nations Observer Group for the verification of Elections in Haiti (ONUVEH), intervened to monitor the 1990 elections. Jean-Bertrand Aristide was sworn in as Haiti's first democratically elected president on February 7, 1991.⁴³ Unfortunately, Haiti's democratic success was short lived. In September 1991, Brigadier General Raoul Cedras, the Commander-in-Chief of the Haitian army, overthrew Aristide in a military coup. Aristide fled to the United States.

The O.A.S. immediately condemned the coup and demanded President Aristide's reinstatement. Further, the O.A.S. called for diplomatic and economic sanctions against the Cedras regime.⁴⁴ The United Nations followed with a similar resolution in October 1991. These resolutions met very limited success. Stronger sanctions were required. "On June 16, 1993, the United Nation Security Council imposed a mandatory oil embargo on Haiti."⁴⁵ Although falling short of the total trade embargo advocated by France, Canada and Venezuela, the embargo also included arms, police equipment, petroleum products and a freeze of the assets of the Haitian government and de facto authorities.⁴⁶

This strict embargo finally forced Cedras to the negotiating table and convinced him to sign the Governors' Island Agreement in New York on July 3, 1993. Under the agreement's terms, Aristide's government was to return to power by October 30, 1993. Unfortunately, the terms of the Governors' Island Agreement were not to come to pass. On October 11, 1993, the *U.S.S. Harlan County* attempted to dock in Port-au-Prince to land the first major contingent of a United Nation's observer group as agreed in the Governors' Island Agreement. A violent and unruly mob supported by army and police personnel met the *Harlan County*. Rather than engage the mob, the *Harlan County* was ordered to return to the United States.⁴⁷

Subsequent to the renewal of economic sanctions, the Security Council passed resolution 940 on July 31, 1994 authorizing "all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President . . . and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement."⁴⁸ Under

⁴² Haiti has been ruled by a succession of military dictators beginning with Francois "Papa Doc" Duvalier in 1957 and temporarily ending in 1987 with the intervention of the Inter-American Commission on Human Rights (IACHR) to monitor democratic elections.

⁴³ Pierce, *supra* note 4, at 481.

⁴⁴ Lori Fisler Damrosch, *Nationalism and Internationalism: The Wilsonian Legacy*, 26 N.Y.U.J.INT'L L. & POL. 493, 497 (1994).

⁴⁵ Pierce, *supra* note 4, at 483.

⁴⁶ Damrosch, *supra* note 45, at 498.

⁴⁷ Pierce, *supra* note 4, at 484.

⁴⁸ U.N. SCOR Res. 940, 49th Sess., 3413 mtg., U.N. Doc. S/Res/940 (1994).

International Law Regarding Pro-Democratic Intervention

United Nations authority, President Clinton ordered United States forces into Haiti to facilitate restoring its democratically elected government.

On December 17, 1995, Haiti held its first successful democratic elections. Aristide protégé Rene Preval won the election with 87.9% of the vote.⁴⁹ The United States completed the withdrawal of its nearly 4,000 military forces from Haiti by spring 1996, turning the operation over to a United Nations force of 1200 led by Canada.⁵⁰ There were six United Nations personnel fatalities during the Haiti operation that cost of \$243 million.⁵¹

ANALYSIS OF THE LEGALITY OF PRO-DEMOCRACY INTERVENTION

Since its inception after World War II, Article 2(4) of the United Nations Charter remains the authoritative statement on the use of force in international law. "It is the crucial norm of this century."⁵² This crucial norm provides as follows: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."⁵³ Article 2(7) bolsters Article 2(4)'s prohibition on forcible intervention by prohibiting outside nations from intervening in matters within the domestic jurisdiction of states.⁵⁴

The only exceptions to the general prohibition on intervention are collective-enforcement operations authorized under Chapter VII of the UN Charter and Article 51 permitting the use of force in national self-defense.⁵⁵

In 1986, the International Court of Justice (ICJ) issued its decision in *Nicaragua v. United States*,⁵⁶ addressing for the first time key elements of the

⁴⁹ Pierce, *supra* note 4, at 511.

⁵⁰ *Id.* at p. 511. See also THE WASHINGTON POST, May 18, 1996, A14.

⁵¹ UN DEPT OF PUBLIC INFORMATION BUL., 1 Mar 96.

⁵² LOUIS HENKIN, *The Use of Force: Law and U.S. Policy*, in RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37-38 (New York: Council on Foreign Relations Press 1989).

⁵³ *Id.* at 38.

⁵⁴ Article 2(7) states: Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII. LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS, 110 (Boston: World Peace Foundation 1949). See also, Michael J. Glennon, *AGORA: The 1994 U.S. Action in Haiti: Sovereignty and Community After Haiti: Rethinking the Collective Use of Force*, 89 AM. J. INT'L. L. 70, 72 (1995).

⁵⁵ Article 51 states in pertinent part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." GOODRICH & HAMBRO, *supra* note 54 at 297.

⁵⁶ *Nicaragua v. United States*, 1986 ICJ REP. 14, 123 and 146-47.

United Nations' charter regarding the legality of nation's resort to force. The court construed Article 2(4) broadly, imposing strict limitations on the use of force, and the exception in Article 51 narrowly, limiting the circumstances in which force may be used in self-defense.⁵⁷

In a very sweeping decision, the ICJ stated the following:

- The only exception to article 2(4) regarding intervention by an individual nation is Article 51. Force against another nation that is not justified by a right of self-defense under article 51 is a violation of article 2(4). . . .
- [We cannot] contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.' [And] to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State⁵⁸

Although a decision of the ICJ is not binding on states other than the parties to the case,⁵⁹ its decisions are highly authoritative.

Further, modern state practice has not allowed for unilateral intervention in nations where chronic disorder or the poor administration government is present. Article 3 of the Conventions for the Definition of Aggression of 1933 provides that acts of aggression against another state cannot be "justified by the 'the internal condition of a State; e.g. . . . alleged defects in its administration; disturbances due to strikes; revolutions; counter-revolutions or civil war.'"⁶⁰ The only actions permitted in nations where "chronic disorder" is present are lawful measures of self-defense under Article 51 of the United Nations Charter, or through United Nations Security Council resolution.

Apparently, outside intervention to provide stability to legitimate governments, or to enforce democratic governance violates Articles 2(4) and 2(7) of the Charter and international norms governing the lawful use of force. Professor Schachter expresses this point bluntly and well: "From the very

⁵⁷ HENKIN, *supra* note 52, at 48.

⁵⁸ *Id.* at 48.

⁵⁹ The U.S. terminated acceptance of compulsory jurisdiction of the ICJ after the *Nicaragua* decision. Jurisdiction was terminated by letter dated October 7, 1985 from U.S. Secretary of State George P. Schultz to the UN Secretary General. See BARRY E. CARTER AND PHILLIP R. TRIMBLE, *INTERNATIONAL LAW*, 323 (Boston: Little, Brown and Co. 1995).

⁶⁰ IAN BROWNIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES*, 347 (Oxford: Clarendon Press 1963).

International Law Regarding Pro-Democratic Intervention

inception of the present Charter system, there has been general agreement that the rule against unilateral recourse to force (except in self-defense) is a fundamental tenet of international law. In recent years, it has been widely characterized as *jus cogens*.⁶¹

INTERNATIONAL NORMS UNDER FIRE

The United States-led United Nations' intervention in Haiti in 1994 raised significant questions regarding the legality of pro-democratic intervention. Before the Haiti intervention the use of force solely to uphold a democratic government was clearly contrary to the language of Article 2(4). Historically, claims that democracy justifies the use of military have been unfounded. As Professor Henkin points out, "[t]he Charter would be meaningless if it were construed or rewritten to permit any state to use force to impose its own version of democracy."⁶² The ICJ in *Nicaragua* echoed these same sentiments.

Notwithstanding the international norm of non-intervention, support for pro-democracy intervention has grown in recent years. This trend is, in part, fueled by the proliferation of covenants and treaties protecting human rights and self-determination.⁶³ However, the roots of pro-democracy intervention go back to the Wilsonian era. President Wilson's interventions in Haiti and the Dominican Republic in 1915 were justified on democratic and altruistic grounds. The basis of Wilsonian foreign policy was to advance humanity and "liberate peoples oppressed by despotic rule . . ."⁶⁴ Although it may be true that moralistic factors were intrinsic to President Wilson's world view, it is difficult to overlook the geo-political advantage the United States achieved by intervening in Latin America. The United States moved from a regional power to world power under President Wilson.

The Wilsonian legacy was carried forward four generations under the "Reagan Doctrine." Set forth in the early 1980's, this doctrine "enunciated a pro-democracy orientation toward intervention, although its implementation in Central America and elsewhere was exclusively preoccupied with helping anti-left political forces regardless of their credentials as democrats . . ."⁶⁵ This is the same policy the Johnson administration advocated during the 1965

⁶¹ Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM.J.INT'L.L. 645, 648 (1984). *Jus Cogens* is a peremptory norm of international law which allows for no deviation. "These rules prevail over and invalidate international agreements and other rules of international law in conflict with them." Restatement of the Law Third: The Foreign Relations Law of the United States, Vol I, 28 (St. Paul, Minn: American Institute 1987).

⁶² HENKIN, *supra* note 52, at 61.

⁶³ See, Universal Declaration of Human Rights in BASIC DOCUMENT IN INTERNATIONAL LAW (3d Ed., Ian Brownlie ed.), 250 (Oxford: Clarendon Press 1983).

⁶⁴ Richard Falk, *The Haiti Intervention: A Dangerous World Order Precedent for the United Nations*, 36 HARV. INT'L L.J. 341, 347 (1995).

⁶⁵ *Id.* at 351.

Dominican intervention. To be sure, the Reagan Doctrine was similar in many aspects to the foreign policies of every American President during the Cold War period.

The key difference between the Wilsonian doctrine of pro-democracy intervention and the model presented today is the means of intervention and the underlying basis for the intervention. Although the Wilsonian Doctrine contained concepts of morality, its primary purpose was to gain an international advantage, whether that advantage be protecting the isthmian canal in Latin America or preventing German intervention in the Western Hemisphere. The means of carrying out the Wilsonian doctrine was almost exclusively unilateral U.S. intervention.

The model of pro-democracy intervention advocated today requires United Nations' sanctioned, collective action. This model was applied in the Haiti intervention. The basis for the intervention may be based on the following two rationale: (1) Irregular interruption of democratic governance, or (2) Collapse of civil order, entailing substantial loss of life and precluding the possibility of identifying any authority capable of granting or withholding consent to international involvement.⁶⁶

DOMINICAN REPUBLIC 1965-HAITI 1994: WHAT'S CHANGED?

There are apparent differences in the Dominican and Haiti interventions. The Dominican intervention occurred during the Cold War where the prospect of a "second Cuba" was a very real threat to national security. The Dominican intervention was carried out, at least at the onset, unilaterally. The Dominican intervention occurred during fluid situation changes in the Caribbean nation. The American-supported loyalist government was on the verge of overthrow. The United States attempted no sanctions lesser to intervention, fearing an immediate communist-backed take over of the country.

The 1994 Haiti intervention occurred after two years of diplomatic process and economic embargoes. It occurred in a relatively benign national security environment. Most importantly, it occurred under the umbrella of a United Nations' resolution.

The issue remains--why do the differences between the Haiti and Dominican Republic interventions legitimize one and not the other. Likely, the United States would not have received United Nations' support had the Haiti resolution been submitted to the Security Council in 1965. As the Johnson administration feared, it would almost certainly have faced a Soviet veto.

⁶⁶ Damrosch, *supra* note 44, at 495.

International Law Regarding Pro-Democratic Intervention

Further, intervention in an effectively governed (democratic or otherwise) sovereign nation without invitation, as was the case in the Haiti intervention, has historically been an international law violation. One commentator summed up customary practice as follows:

In the old order, it was clear that, when it came to the permissibility of using force to overthrow an "illegitimate" government, international law made no distinction between governments that had come to power lawfully (under the state's prior domestic law) and those that had not. Whether a government had acquired power by ballot or bullet was irrelevant⁶⁷

The 1994 Haiti intervention only gained lawfulness from the United Nation Security Council Resolution authorizing the action. Arguably, Security Council Resolution 940 approving the intervention exceeded the bounds of Article 39⁶⁸ of the Charter which authorizes enforcement operations. The Cedras regime neither threatened nor breached international peace. In the past, some violation of sovereignty or armed attack was required before a Chapter VII enforcement action could be invoked (*e.g.* Korean War, Gulf War, Bosnian Conflict).⁶⁹

Further, the argument that the United States acted solely for humanitarian reasons when the Clinton administration decided to intervene in Haiti is only half-true, like President Johnson's public statements in 1965. From a domestic security vantage point, the Clinton administration had a tremendous stake in stopping the flow of refugees from Haiti.

CONCLUSION

The 1965 Dominican intervention and the 1994 Haiti intervention illustrate well how the application of international law has evolved since the Cold War. In the bipolar world, United States or Soviet unilateral intervention was more likely to occur to protect national interests, due in large measure to the political dynamic in the Security Council. United Nation's sanction for the Dominican intervention was very unlikely. History has condemned the Johnson administration's decision to intervene in the Dominican Republic primarily because the intervention lacked actual legitimate grounds. The communist

⁶⁷ Glennon, *supra* note 54, at 71.

⁶⁸ Article 39 states: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace." GOODRICH & HAMBRO, *supra* note 54 at 262. Article 41 of the Charter allows the Security Council to employ means short of armed force to compel a compliance with international law (*e.g.* economic embargoes, diplomatic sanctions). Article 42 permits the Security Council to authorize the use of armed force against a non-compliant nation.

⁶⁹ *Id.* at 72.

threat in the Dominican Republic existed more in President Johnson's fear of a Cuba-repeat, than in reality.

History's read of the Dominican intervention could have been very different if a viable communist threat existed in proof. With the Cuban missile crisis fresh in the minds of most Americans, many would agree that stemming the tide of communism in the Caribbean was a vital U.S. national interest. One worthy of unilateral military intervention.

Protection of vital national security interests will always warrant unilateral intervention (legal justification of that intervention is a different issue). Anthony Lake, President Clinton's national security advisor, recently addressed the unilateral use of force in describing the Administration's National Security Strategy of "Containment to Enlargement." Mr. Lake states a very parochial view:

For any official with responsibilities for our security policies, only one overriding factor can determine whether the U.S. should act multilaterally or unilaterally, and that is America's interests. We should act multilaterally where doing so advances our interests, and we should act unilaterally when that will serve our purpose. The simple question in each instance is this: What works best?⁷⁰

The Haiti intervention has been reviewed favorably, due to its collective character and the minimal use of force required to achieve the operation's goals. The fact that the United States was able to carry out the Haiti intervention with minimal loss of life is praiseworthy. However, let no mistake be made, "the credible threat of [United States] military force in the Haitian case must be considered ultimately responsible for the removal of General Cedras and the de facto military government."⁷¹

In the final analysis, the proper application of international law regarding intervention has less to do with the letter of the law than with the circumstances in which the law is interpreted. International law does not give template answers to most issues. International law provides guiding principles which are applied and interpreted on a fluid, situational basis. Ambassador Albright stated regarding the United Nations Charter, "[s]uch documents require interpretation; the principles require codification as they are applied to one set of issues and then another"⁷²

⁷⁰ Anthony Lake, *From Containment to Enlargement*, 4 U.S. Dept of State Dispatch, 663 n. 39 (September 27, 1993).

⁷¹ Pierce, *supra* note 4, at 510.

⁷² Ambassador Madeleine K. Albright, *International Law Approaches the Twenty-First Century: A U.S. Perspective on Enforcement*, 10 FORDHAM INT'L L.J. 1595, 1596 (1995).

International Law Regarding Pro-Democratic Intervention

The codification of evolving norms regarding intervention into sovereign affairs is unlikely. However, certain factors for arriving at a case-specific consensus to intervene within the United Nations Security Council can be identified. Some of these factors include: (1) What are the national interests at stake? (2) Who are the States involved? (3) Are they politically strong or weak? (4) Does the intervening nation(s) enjoy domestic public support? (4) What international and regional organizations are involved? (5) What is the political dynamic in the United Nations Security Council? (6) What are the costs of the intervention, in terms of human life and money? (7) Do the costs outweigh the benefits to the intervening nation and the international community? (8) What is the likelihood of achieving the desired result?

Professor Damrosch recognizes that a pragmatic approach that must be taken when developing precedents for lawful collective interventions. She states, "The political reality is that effective action comes about when one or more strong states have interests that motivate them to take initiatives; otherwise, inertia generally prevails."⁷³

⁷³ Damrosch, *supra* note 44, at 508.

THE DEFENSE INSTITUTE FOR INTERNATIONAL
LEGAL STUDIES

Walter W. Munroe

(Note: As of 1 October 1997 the International Training Detachment (ITD) of the Naval Justice School became the Defense Institute for International Legal Studies. It is still physically located at the Naval Justice School in Newport, RI)

Television's *JAG* capitalizes on the American fascination with both lawyers and adventure. The show, which is seen in the United States as well as other countries, depicts military lawyers saving the world from a variety of threats--terrorists, malevolent dictators, as well as a host of would be villains who threaten world order and the security of the United States. Although *JAG* may feature plots that are hard to imagine as plausible, there are JAGs who have a mission that is far removed from the traditional role of the military lawyer. Beginning in 1992, military lawyers from each of the uniformed military services ventured into developing nations in which the "rule of law" is often tenuous and sometimes non-existent. These JAGs have presented seminars in 61 different nations since 1992. At times their missions have involved threats from terrorists, civil war, and insurrection. More often these legal teams were faced with foods of dubious origin, disease, contaminated drinking water, and a grueling travel schedule. While the major reason for being in a country is to present subject matter, every member of the Mobile Education Team (MET) also tries to build personal relationships in countries in which language, gestures, and conduct could easily be misinterpreted.

The Naval Justice School in Newport, RI took the lead in developing this program which has become the most successful program under the Expanded International Military Education and Training (EIMET) initiative launched by Congress in 1991. Responding to a world which had changed dramatically in a few years, the United States Government had to initiate new relationships with the many emerging democracies which included former Soviet countries, ex-dictatorships, and countries which were redefining themselves. The foreign militaries, in particular, presented challenges including:

The Defense Institute for International Studies

- Ill defined military justice systems - often mixed with the civilian legal system
- Use of corporal punishment as the preferred method of discipline
- Horrendous records of human rights abuses
- A need to redefine the historic relationships between the military and the civilian population

As democracy spread as the preferred method of governance in these developing countries, EIMET was devised to address the challenges.

The Naval Justice School International Training Department began building a program that would address three basic goals of EIMET:

- Creating understanding and fostering civilian control of the military
- Improving military justice systems
- Fostering human rights principles

In true entrepreneurial fashion, the Department was initiated with one officer and no dedicated support staff. Never having been involved in the training of international students proved to be both a blessing and a burden. Starting with a survey visit to Guatemala in July 1992, a system evolved which was both minimalist and flexible. Instead of a large permanent staff, a core group of officers, military lawyers, would serve as country coordinators. The country coordinator was then responsible for:

- Communicating with the host nation, embassy personnel, and the Navy Education and Training Security Assistance Field Activity (NETSAFA)
- Developing a curriculum
- Preparing the course in both English and in the language of the host country
- Selecting a team
- Carrying the equipment such as translation gear, projection systems, computer, overhead, needed to instruct a different country
- Teaching as many as six different subjects
- Coordinating social events
- Undertaking everything and anything that was needed to successfully accomplish the goals of EIMET.

In 1993 the International Training Department became the International Training Detachment (ITD) with a core staff which by 1994 consisted of five military lawyers - two from the Navy and one each from the Air Force, Marines, and Army -and a civilian support staff consisting of a curriculum developer and a secretary.

While the detailed planning prior to the seminar involves few legal matters, the ability to organize and relate to people are key factors in the eventual success of the METs. A MET consists of three to five members who are selected

because of the unique skills and background they possess. JAGs from the various services' JAG schools, line officers, non-commissioned officers, military and civilian lawyers, judges, and investigators have all been team members. The team may be located in or out of CONUS. Attempting to carry out a mission in a distant land with a team which is widely scattered creates many problems which could be "show stoppers." Passports and visas need to be obtained for countries that sometimes rarely see Americans. Arrangements need to be made for travel to out of the way places that are served by airlines with names unknown to frequent flyers. Itineraries of team members have to be matched to be sure that the team and all of its equipment arrive in ample time to recover from jet lag and set up for the busy week or weeks ahead. Usually, the teams travel to a major city to present the seminar. Many countries lack a satisfactory transportation infrastructure, however, making it more expedient to send the team into the countryside, rather than bring 40-60 participants into the city. This, of course, further complicates the presentation of the seminar.

Semper Gumbi might best be selected as the motto of ITD if one considers the many twists which have happened that have made even the best made plans come apart. Consider these travel misadventures:

- All of the translated teaching materials and translation gear needed to communicate lost in transit on the way to the seminar
- Weather delaying the arrival of all but one member of the teaching team until after the scheduled seminar start
- Flying to a remote location on a helicopter which is overloaded with people, equipment, and farm animals
- Customs officials who demand a bribe before admitting the team into the host country
- Translation equipment being held at customs, because customs officials believe it may be "spy" equipment
- Frequent bouts of a variety of travelers ailments

Once the MET has arrived in-country, the challenge of conducting a seminar with an audience that speaks another language begins. It would be easy to stand and lecture to the audience and then return to the United States, but real dialogue can not happen unless difficult subjects - human rights, legal systems, disciplinary techniques, rules of engagement, and others - are addressed. The topics have already been mutually decided upon in the early phases of planning which happen well before the actual seminar. Throughout the process of curriculum development, the host country has had a voice in determining the content of the seminar. In this way, there is a sense of ownership and partnership that will set the tone. To involve the audience as participants, discussion problems are used. The team breaks the seminar participants into small groups. Each group is then assigned a "real" life problem based on subject matter presented in the seminar, and customized to the specific problems confronting the country. These discussion groups often present an opportunity for members of the society - military and civilian - to seek solutions in a non-threatening arena. The US team has several advantages in

The Defense Institute for International Studies

situations like this. First, there is a degree of trust because military personnel are presenting ideas to their fellow military members. As outsiders, the team can provide a forum that would not otherwise be available for persons with varying viewpoints in a country. Most important, the audience senses the prestige and power of the United States demonstrated in an exchange of ideas between the team and the participants.

The audience varies greatly from country to country. Although designed for 40-60 participants, it is not unusual for the room to be filled to capacity and overflowing. In one eastern European country, 96 participants, mostly civilian, crowded the room, because this was the first US sponsored program in their country since the demise of Communism. In Asia, an all military audience of 85 including 12 generals, participated in the seminar. ITD was then invited to present the same seminar in every province and has since returned 14 times. Non-governmental organizations often participate, both as part of the audience and as co-presenters. Local television and press frequently cover the opening and closing ceremonies. ITD teams have been on news shows in every continent, made the headlines in half a dozen languages, and taken part in impromptu discussions on everything from US policy to the oddities of our culture. The formal aspects of the seminars usually involve the Minister of Defense and the US Ambassador. But, on several occasions, the President of a country or the Prime Minister has been present to say a few words, present graduation certificates, and lend even greater significance to the program.

Perhaps, more important are the personal contacts which are made. Discussion of topics continues well after the official daily conclusion of class. Students stay late and arrive early. Lunch time is a continuation of class. Any one who has traveled with a team has been awed by the hospitality and friendship of their hosts. Evenings might involve a dinner in a restaurant, a night at the sauna, a hunting expedition, a site-seeing tour, or an officially sanctioned banquet. But, even these informal events are opportunities for continued discussion. Team members are often invited to visit the families of participants with whom friendships have developed. In one country, the visiting team was invited to a wedding. Friendships continue long after the conclusion of the seminars through email and letters. While at these unofficial events, the teams have found that the interest in topics raised during the seminars has caused greater curiosity in possible solutions, opened communications within the host country, and enhanced the image of the United States.

A major goal of the program is to have the seminars become annual events. Starting with the phase 1 survey, emphasis is placed on developing new methods of assistance. At the conclusion of a seminar, the topic is "what topics should be included in the *next* seminar?" Twenty-six of the countries who participated in FY 97 were hosting phase 4 or later seminars. Most of these seminars were for two week periods. An initial seminar offers topics that are more general, such as Military Justice, Law of Armed Conflict, Administrative Measures, and Nonjudicial Punishment. These topics are usually aimed at mid

grade and higher ranking officers and civilians involved with the military.

Later seminars are focused on a more specific audience, such as lawyers and judges or one military group such as air force commanders. Team makeup also changes for these seminars. General officers, senior judges, and civilian homicide detectives have all been members of such teams. Several countries have hosted eight or more seminars.

On October 1, 1997, the International Training Detachment became the Defense Institute for International Legal Studies. This name change represents recognition of the hard work by the military members and civilian support staff, as well as acceptance of the subject matter and the techniques used over the past five years in establishing a new program. As of 30 September, 61 nations had taken part in this program. A total audience of 7,900 has participated, one fourth of which were civilians. Has the program had an impact? Consider the following comments:

"We don't normally report on all the military programs and visits that take place in Ulaanbaatar, but the just finished IMET funded program was too good to keep to ourselves. The team of four lawyers from the International Training Division at the Naval Justice School...spent four days working closely with an enthusiastic and appreciative group of over 40 Mongolian lawyers and judges, both civilian and military." US Embassy Ulaanbaatar, Mongolia

"The Albanian Armed Forces are confronted by immense change, the most complex portions of which are neither tactical nor strategic, but rather philosophical. Indeed Clausewitz noted that an army is most susceptible to change when it is not in transition. The Albanian Armed Forces are a case in point. The exposure to new concepts, values, and most important, people, is of inestimable value,...ITDs contributions apropos the modernizing of our legal codes, have been without parallel." Ministry of Defense, Albania

"At times during the six months of preparation for this seminar, we asked ourselves if it would turn out to be worth the effort and whether the subject matter would be appropriate and well-received. The answer is a resounding "yes" on both counts. Perhaps the greatest benefit was to bring nationwide positive attention to the military and security forces, elements of Central African society which are largely overlooked except when they are blamed for indiscipline and heavy-handedness." US Embassy Bangui, Central African Republic

Perhaps none of the real JAGs will ever make television, but the impact that this program is having exemplify the highest ideals envisioned by the EIMET program. Who knows, maybe there will be a plot or two which could make the show. Now, if they can only find a suitable role for me, my acting career will be launched!

"Neither Confirm nor Deny" At Sea Still Alive and Consistent With International Law

By James R. Van de Velde

Although all tactical nuclear weapons have been withdrawn from U.S. surface ships and attack submarines, including all nuclear Tomahawk cruise missiles, as well as nuclear weapons associated with U.S. land-based naval aircraft, as part of President Bush's nuclear initiative of September 27, 1991, the U.S. policy of neither confirming nor denying the existence or absence of nuclear weapons, or any kind of weapon, aboard its warships will remain. This is because "neither confirm nor deny" (NCND) is more than longstanding policy regarding the arsenals of U.S. warships; it is because NCND reflects an international right that is one hundred and eighty-three years old and is consistent with both customary and conventional international law.

For almost two centuries now, warships have been entitled to the privileges the right of sovereign immunity accords them. Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction to a foreign state.

Sovereign immunity ensures that the subjects and property of a sovereign power are treated as immune to search, seizure, interference or any type of enforcement jurisdiction. Sovereign immunity is granted to foreign governments as a matter of comity; it is a privilege granted by one sovereign to another in the family of nations.¹

Sovereign immunity was first recognized by U.S. courts in the landmark case of *The Schooner Exchange v. M'Faddon* in 1812.² There, Chief Justice Marshall upheld a plea of immunity, supported by the executive branch, by noting that immunity was supported by the law and practice of most nations. He relied heavily on the practices and policies of the State Department. Marshall held that a warship of a foreign sovereign at peace with the United States, having entered a U.S. port open for her reception and demeaning herself in a friendly manner, is exempt from the jurisdiction of U.S. courts.³ This reasoning reached its legal culmination in *Ex Parte Pers* 328 U.S. 578 (1943) and *Mexico v. Hoffman*, 324 U.S. 30 (1945).⁴

Under the doctrine of sovereign immunity, nations recognize that warships are immune from the enforcement jurisdiction of the nations they

¹ 28 U.S.C.A. 1446 to 1650, (1990).

² See Eleanor C. McDowell, *Digest of United States Practice in International Law 1976*. Washington, D.C.: Department of State Publications, 1977, at 322.

³ See Marjorie M. Whiteman, et. al., *Digest of International Law, Volume 6*. Washington, D.C.: Department of State Publications, 1968, at 380-1.

⁴ McDowell, *supra* note 2.

visit, whether they be in their ports or territorial waters, and from jurisdiction on the high seas. Under U.S. foreign relations law, consent to the presence of a foreign force within its territory implies that it waives its right to exercise its enforcement jurisdiction, with respect to the members of the force, and consents to the exercise within its territory of the sending state's jurisdiction.⁵ In other words, the United States recognizes that it holds no legal jurisdiction over the warships that it permits to dock in U.S. ports. In return, the United States enjoys the same privileges, including the right not to have to divulge the complement or ship characteristics or cargo of its ships when visiting foreign ports or territorial waters.

Regarding the jurisdiction over a foreign force's internal administration and discipline, under U.S. foreign relations law, consent to the presence of a foreign force within its territory also implies consent to the exercise of the sending state's jurisdiction to enforce its own rules.⁶ In plain language, the administration of the ship and the crew's discipline on the ship is the business of the flag, not the business of the port nation. This means nations have the right to punish crew members as they see fit on their ships even in the territorial waters of the United States.

Our policy of neither confirming nor denying the presence or absence of nuclear weapons or any weapon aboard U.S. warships is consistent with these immunities which warships have enjoyed under customary international law regarding the sanctity of their characteristics and crew complement.⁷

The sovereign immunity of warships does not prevent nations from exercising their right to prohibit the visit of warships of another state. The rights of sovereign immunity does mean though that the applicable law regulating the internal discipline of a warship's crew, as well as its design characteristics and equipment, are regulated by the flag state of the warship.

The 1982 Law of the Sea Convention, which the United States signed in July 1994, codifies these legal rights. Articles 25 and 30 protect the rights of a coastal state to deny port visits of foreign ships, including warships. Article 94 protects the rights of ships and reads, "every State shall . . . assume jurisdiction under its internal law over each ship flying its flag and its master officers and crew in respect of administrative, technical and social matters concerning the ship."

The Law of the Sea Convention reflects customary international law regarding the legal jurisdiction of ships long recognized by sovereign states. The United States, along with all other nations, enjoys the legal right not to have to divulge the presence or characteristics of any weapon it carries on its warships or the presence of any individual on board. Article 32 of the Law of

⁵ Whiteman, *supra* note 3 at 385.

⁶ *Id.* See also *Id.* at 387.

⁷ *Id.*

“Neither Confirm nor Deny”

the Sea Convention explicitly protects the immunities of warships provided port visits and reads, “nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.”

Thus, while all nations have the right to deny permission for a ship to visit its ports, no nation has the right to inspect or demand to learn the contents of a warship it grants visiting rights. Nations have no right, for instance, to demand a list of a ship’s crew, or learn their religious preferences or sex or place of origin. Regarding civil jurisdiction over a foreign force, again, under U.S. foreign relations law, consent to the presence of a foreign force within its territory implies agreement not to exercise civil enforcement jurisdiction over a member of the force in a manner that substantially interferes with the performance of the mission of the force.⁸

⁸ *Id.* at 388.

In 1985, when New Zealand demanded an assurance that visiting U.S. warships had no nuclear weapons aboard, New Zealand was, in effect, asking in a backward manner that the United States divulge the characteristics of its warships and sacrifice a right afforded under international law. The United States replied that it did not confirm nor deny the presence or absence of nuclear weapons aboard its warships. Such a reply was considered insufficient to allay New Zealand concerns. The port visit was subsequently denied.

Sovereign immunity protects all characteristics of warships at sea. If a nation were required to disclose which ships carried certain weapons, it might then be asked to disclose system capabilities, or crew lists, or ship defenses. This would trigger a dangerous and slippery legal slope.

Nations that demand to learn whether U.S. ships carry certain weapons are asking the United States to give up a legal prerogative from which all seafaring nations benefit. The United States is neither the author of this international principle nor the sole beneficiary. The doctrine of sovereign immunity benefits and protects all states.

NCND will remain part of the U.S. "existential nuclear deterrent" associated with U.S. naval forces. President Bush, in his address of September 1991, specifically noted that, "under normal circumstances, our ships will not carry tactical nuclear weapons. Many of these land and sea-based warheads will be dismantled and destroyed. Those remaining will be secured in central areas where they would be available if necessary in a future crisis."

The President reserved the right to re-deploy such tactical nuclear weapons. A future President may or may not announce such a re-deployment and President Bush's initiative was not codified in any international legal obligation. Thus such weapons may today be on some U.S. warships, consistent with all U.S. legal obligations. President Bush's initiative was an offer to the Soviet Union to follow the U.S. lead, an offer that was met with a somewhat ambiguous but overall reciprocated response from then Soviet President Mikhail Gorbachev, two months before the Soviet Union collapsed. It is unlikely, however, that future opponents of the United States in future conflicts would be sanguine that U.S. warships were free of all tactical nuclear weapons simply because of President Bush's initiative. NCND will remain an important principle in U.S. defense policy and may be explicitly referred to again if U.S. naval forces are sent into action.

Of course, NCND protects the nefarious as well as the law-abiding. Nations that wish to transport substances such as nuclear, chemical or biological warfare material could use their warships as cargo vessels and not fear any international interference. Warships could thus be used to circumvent international agreements such as the Chemical Weapons Convention or Biological Weapons Treaty. Weapons of mass destruction ironically require little mass themselves.

“Neither Confirm nor Deny”

In 1993, the United States stopped a Chinese freighter in the Middle East it suspected of carrying Chemical Weapons to a buyer country. The inspection yielded no such weapons but clearly unnerved the Chinese who protested the U.S.-led action vehemently. If the Chinese are indeed engaged in such illegal activities, perhaps subsequent shipments will go by warship, not cargo ship. This possibility is a severe threat to the success of several international arms control regimes. Sovereign immunity, like all other laws, thus involves tensions between positive and negative security objectives for the United States and the West as a whole.

Nevertheless, NCND is neither anachronistic nor obsolete; it is the embodiment of longstanding principles of international law which all nations should protect.

James R. Van de Velde, Lecturer in Political Science at Yale University, was a member of the U.S. Delegation to the Nuclear and Space Talks with the Soviet Union from 1989-1992. He received his Ph.D. from The Fletcher School of Law and Diplomacy in 1988.

REMARKS OF

**MR. VLADIMIR V. GRACHEV
SENIOR OFFICER (POLITICAL AFFAIRS)
EXECUTIVE OFFICE OF THE SECRETARY-GENERAL
UNITED NATIONS**

24 APRIL 1998

**AT THE GRADUATION CEREMONY FOR
CLASS 98020 - LEGAL CONSIDERATIONS FOR
MILITARY AND PEACEKEEPING OPERATIONS**

**ADDRESS TO
THE NAVAL JUSTICE SCHOOL**

"UNITED NATIONS PEACEKEEPING IN TRANSITION"

**INTRODUCTION BY
RADM DONALD J. GUTER, JUDGE ADVOCATE
GENERAL'S CORPS, UNITED STATES NAVY**

**COMMANDER, NAVAL LEGAL SERVICE COMMAND
AND DEPUTY JUDGE ADVOCATE GENERAL OF THE
NAVY**

RADM GUTER: Good morning, ladies and gentlemen. I would like to join CAPT Young in welcoming you to this graduation ceremony for the Naval Justice School's second Peacekeeping Operations course. While I have had the privilege of speaking at other ceremonies here at the Justice School, and the privilege of taking part in the graduation ceremony for the first Peacekeeping Operations Course down in Washington, this occasion is of special significance for several reasons.

This is the first time we have graduated an international class at the Naval Justice School. While the school has been involved in international training through its Defense Institute of International Legal Studies for six years, virtually all of that training has been conducted overseas. Moving into the arena of international residential courses here in Newport is a huge leap forward for this school, and reflects well on the success of the staff here. This course, more than any other, affirms the Naval Justice School's success in international training since first being designated as the Department of

United Nations Peacekeeping in Transition

Defense's lead agency for legal training under the Expanded International Military Education and Training Program.

This event is also significant because of the nature of the course: training on the legal issues and concerns involved in peacekeeping and military operations. In today's political climate, peacekeeping operations involving personnel from many nations are an increasing – and increasingly important – aspect of the world scene. Nothing is more important than ensuring that those forces share a common understanding of the concepts and issues involved in conducting peacekeeping operations. That common understanding cannot be achieved, except at great cost in “on the job training” during actual operations, without a course such as this.

Finally, this is occasion is particularly significant because of the gentleman who is scheduled to speak next, Mr. Vladimir V. Grachev. To the best of my knowledge, this is the first time a senior official of the United Nations, much less a citizen of Russia, has been the graduation speaker at any graduation ceremony hosted by a U.S. military school. How the world has changed in only a decade or so – and changed for the better! The climate for international cooperation has never been better, the opportunities for increased understanding more numerous, the risks greater – or the consequences of failure more frightening – than they are today. And never has the United Nations been more important to world peace and security than it is today.

But enough from me. At this time I would like to introduce the keynote speaker for today's graduation ceremony, Mr. Vladimir V. Grachev, Senior Officer (Political Affairs), Executive Office of the Secretary General of the United Nations. Mr. Grachev has had a distinguished career as a diplomat, first representing the interests of the former Soviet Union, then those of his native Russia, and now those of the United Nations. You will find the details of that distinguished career in today's program, so I will not take up further time by detailing them now. Instead, let me simply give you Mr. Grachev!

MR. GRACHEV: Rear Admiral Guter, Captain Young, Graduates, Distinguished Guests, Ladies and Gentlemen,

I am grateful for the opportunity to address this distinguished audience on the role of the United Nations in preventing war and promoting peace. The United Nations' responsibility for the maintenance of peace and security is the cardinal mission – the first purpose declared in the Charter. How the United Nations carries out that mission will have a profound influence on our future and on the legitimacy and credibility of international society.

As the Cold War waned and came to an end, the international community increasingly placed the United Nations at center-stage in efforts to resolve outstanding questions and to calm newly emerging disputes.

Being in Newport has a special significance for me. Twenty-three years ago I came to New York for the first time as a young diplomat of the Soviet Mission

to the United Nations, and was tasked to arrange the opening of a new Consulate-General in New York in accordance with an agreement signed by President Nixon and the General Secretary of the CPSU, Mr. Brezhnev.

The Consulate-General was assigned nine Northeastern states as its consular district. Rhode Island was one of them. This state was also a very special one. Among the nine states of the consular district, only Rhode Island was off limits for visits by Soviet diplomats. It belonged to the so-called "closed areas" which at that time existed in the Soviet Union and the United States for visits by diplomats.

By being invited to address you today as a UN official of Russian origin, I am happy to state that the world has definitely changed and the disappearance of closed areas is a vivid demonstration of this change and the end of the Cold War.

The United Nations was dedicated, above all, to the pursuit of peace and, in the enduring words of the Charter, to saving "succeeding generations from the scourge of war."

In the half-century since those words were endorsed by the nations of the world, United Nations "blue helmets" have deployed in more than forty operations on four continents. They have patrolled inter-state borders and contained intra-state conflicts. They have observed cease-fires and they have protected humanitarian convoys.

They have saved tens of thousands of lives. They have proven their value and have become a pre-eminent symbol and catalyst for international cooperation.

The evolution of UN peacekeeping from the traditional kind of patrolling buffer zones and cease-fire lines to the modern, more complex manifestations in the former Yugoslavia, Haiti, and Angola, just to mention a few, has been neither smooth nor natural.

"Multidisciplinary operations" were deployed, with the job of helping the parties restore, or even create, the institutions of a functioning State amid the destruction and to establish the social foundations that would allow these institutions to thrive.

Peacekeeping operations were asked to address urgent crises, but the deployment of personnel and resources necessary to do so was strangled by antiquated rules and procedures of the Organization which prevented quick procurement and recruitment.

Therefore, peacekeepers were asked the impossible, and sometimes, therefore, even failed to achieve the possible.

Should the UN, in Rwanda, have done more to prevent the catastrophe?

United Nations Peacekeeping in Transition

Should the UN, in Bosnia, have been able to prevent the safe areas from falling?

But *could* the UN, in either of these cases, have done so, with the means and mandate at hand?

When global opinion calls for the world to "do something" about a crisis, the UN becomes the "doer", whether it has been given the tools or not.

It is clear that the reports of peacekeeping's demise, to paraphrase Mark Twain, are much exaggerated. For one thing, the number of peacekeepers around the world are still at roughly the same levels as they were at the peak of UN peacekeeping, in 1994.

From the mid-1993 to the end of 1997, the number of United Nations peacekeepers fell from a peak of nearly 80,000 to approximately 13,000. But the total number of peacekeepers on the ground remained constant with the induction of troops under multinational and regional efforts:

- Bosnia and Herzegovina with IFOR/SFOR
- Liberia and Sierra Leone with ECOMOG
- Georgia and Tajikistan with the CIS
- multinational forces such as that in Haiti led by the United States; in Rwanda led by France; the Central African Republic with MISAB; and the Italian-led effort in Albania.

NATO members were reassessing its role in the post-Cold War era, and were considering its capacity to contribute within a "new frontier" based upon enlargement of its mandate, particularly through peacekeeping. At the same time, the Member States of the CIS appeared to be ready to play a stabilizing role within an "old frontier", across the region which had been the USSR.

In an effort to limit exposure, risk and cost of UN operation, the international community sought to draw on the peacekeeping potential of others. In many cases, a peacekeeping force was provided by a regional or sub-regional arrangement, or an ad hoc group of states, while the UN deployed a much smaller, and usually unarmed, operation to carry out monitoring or capacity-building functions.

Not surprisingly, greater reliance on regional operations has begun to raise questions. Doubts have been voiced as to the professionalism and conduct of some forces that face significant structural, financial and/or planning limitations. Those which are able to field forces have no realistic prospect of operating outside of limited geographical areas, nor is it a foregone conclusion that they will reach agreement to deploy even within their own region.

On the political side, a similar evolution has taken place in political terms. Within the CIS, concerns have been raised regarding legitimacy. Furthermore, the motives of some of the most influential Member States of certain operations have been questioned.

It is just that most of them today do not wear UN blue: they keep the peace under the banner of NATO, or CIS, or the Economic Community of West African States. Nonetheless, there are many parts of the world where such regional organizations are not available, or not able, to undertake peacekeeping operations.

Traditional peacekeeping operations of the kind deployed during the Cold War are unlikely to be repeated for the simple reason that the structures that sustained the Cold War also limited the threats to peacekeepers and to their mandates.

Peacekeeping today requires not only rethinking the means, but also the method, of implementing the mandates set out by the Security Council. As the skeptical view of UN peacekeeping begins to turn around, the international community seems to have realized that, due to a hesitancy to get involved in Congo-Brazzaville in July 1997, it missed an opportunity to stem the ensuing bloodshed and damage to the economic and social fabric of that country. The loss of life and the cost of investment to rebuild are high.

The very notion of "parties" to a conflict also requires reassessing, given the growing number of conflicts in which central control is weak, rival militias operate independently, and outside powers insert themselves on multiple fronts.

The destabilization of neighboring countries through an escalation of tensions and refugee flows has expanded our understanding of threats to international peace and security.

We recognize that the rapidity with which we are able to deploy may determine not only the success of the mission, but also the ability to prevent the massive loss of innocent life. We recognize, too, that the peacekeeping force must also be a credible one; sometimes a convincing show of strength can prevent the need for its use.

As the Secretary-General stated upon his return from Baghdad, his mission was successful not only because of diplomacy, but because it had been supported by the strength of the force displayed by the US and UK. He called them perfect peacekeepers.

Peacekeeping is not always the best instrument for the task at hand. In some circumstances, it could even be counterproductive, side-tracking other efforts to take more forceful action. However, there are many cases when the timely deployment of a credible peacekeeping operation is precisely the response that is required to prevent a conflict or stabilize a situation and then to commence the process of reconciliation. In those cases, the courage must be summoned to act early and decisively, on the basis of sound planning, with the will and the resources to succeed.

United Nations Peacekeeping in Transition

In this connection, it is important to put into perspective the much-discussed notion of exit strategies for military operations. Certainly, no one believes that a mission should commence without strict goals and guidelines for its implementation within certain time-frames. Nor does anyone believe in never-ending missions.

To deploy an under-resourced and therefore vulnerable operation is to invite the parties to challenge it at every turn, stymieing achievement of the mandate and jeopardizing the safety of UN personnel.

On a more positive note, allow me to share with you some recent lessons learned. Three missions have closed successfully in the last year. In Liberia, UNOMIL was able to close after helping ECOMOG create an environment secure enough to organize free and fair presidential elections. In Guatemala, a military observer group attached to MINUGUA has, without incident, overseen and assisted in the disarmament and demobilization of the former insurgents. Implementing its mandate according to its tight schedule of three months, it played a crucial role in that country's historic emergence from decades of conflict. In Croatia, UNTAES, the transitional administration for Eastern Slavonia achieved the "peaceful reintegration of this Danubian region", despite the many doubts which accompanied the operation's creation. UNTAES, set up under Chapter VII of the Charter, was one of the most complex the UN has ever run. It had to organize a new multiethnic police force, facilitate the return of refugees, organize elections, assist in the development and economic reconstruction of the region, and undertake tasks related to civil administration and the functioning of public services.

The preliminary review of these three operations might give you the feeling that the trend toward the progressive and steady reduction of United Nations activity in the area of peacekeeping continues unabated, as has been the case over the last two years. This would be a misperception. Recently, the Security Council adopted a resolution authorizing the establishment of the new United Nations Mission in the Central African Republic. With the establishment of this mission, Member States have demonstrated renewed conviction that, in the right circumstances, peacekeeping can achieve success. Expected to be fully deployed by April, MIMURCA will take over responsibility from the Inter-African Mission to Monitor the Bangui Agreements and will work to maintain security and stability in Bangui. This is also a strong and symbolic message sent to Africa at a time when that continent is receiving, and deserves, strengthened support and attention. This message must be balanced against the need to prevent a relapse into fighting, not only in order to defend the civilian populations, but also to protect the very considerable investment of the international community in achieving such a peace.

I would now like to offer an argument which, to me, seems particularly pertinent. When attention turns – and justly, incidentally – to the necessity to prevent conflict rather than to remedy it, it must be understood that peacekeeping is but the middle link in the chain that runs from peacemaking to

post-conflict peacebuilding. It is a middle link, but it is also, perhaps, the essential link.

The use of peacekeeping by the international community, in pursuit of common interests, must be credible and it must be legitimate. Credible force without legitimacy may have immediate results, but will not enjoy long-term international support. Legitimate force without credibility may enjoy universal support even as it is unable to implement the basic provisions of its mandate.

Combined, however, under the umbrella of the United Nations, credibility and legitimacy in the use of force are not only possible, but mutually reinforcing in pursuit of a universal ideal. To achieve this unity of purpose and promise, we must restore the global faith in the United Nations.

With 13,387 peacekeepers now deployed in 15 missions across the globe, United Nations peacekeeping today is indeed leaner than it has been for some time. But, with the prospect of new missions, as well as the fact that peacekeeping operations are more complex, more concrete, and more diverse than ever, the demands upon UN peacekeeping have remained heavy; they might well continue to be so in the future.

In the spirit of Chapter VIII of the UN Charter, partnerships with regional organizations are indeed welcomed, many of them having real potential and having already borne great fruit. But we must bear in mind that it would be naïve or even dangerous to affirm that peacekeeping operations must now be organized only region by region, or solely by regional and sub-regional organizations, or by coalitions of the willing in each of these areas.

While most of today's conflicts take place in countries that might be remote from the focus of the populace of major powers, inaction toward them sends a tacit invitation to illegal and competing foreign interventions. Since most of today's conflicts have international as well as civil characteristics, they have the potential to destabilize their neighbors, and to spread throughout entire regions. Local conflicts can also generate a host of transnational problems about which the international community has expressed particular concerns, such as illegal arms flows, terrorism, drug trafficking and environmental degradation.

If we are to address the crises that confront us, and if we consider that inaction is not an option when innocent human lives are at stake, what remains essential is that the system and structure that have been designed, constructed, and sustained for that purpose in the UN be given the strength and the flexibility to respond as rapidly and effectively as possible to such challenges.

More than ever today, it is important that operations be undertaken with clear political objectives, and a clear recognition of the cost of reaching them. Today's operations must be framed with a broader perspective, as part of a comprehensive process. Such operations can serve as a link between peacemaking and peace-building efforts.

United Nations Peacekeeping in Transition

Successful peacekeeping today demands a range of credible options for force protection and mandate achievement, including the enhancement of the capacity for deterrence through strength. In this context the problems presented by a rigid interpretation of the distinction between Chapter 6 and Chapter 7 operations must be faced. Prudence dictates that Chapter 6 operations are sometimes deployed with a credible deterrent capacity, while some Chapter 7 operations, depending on the circumstances, could be deployed without any such requirement. A pragmatic approach is necessary.

The success of the peacekeeping operation should be judged on whether the parties obtained a fair chance at a lasting peace, not on whether they had the wisdom to make use of it.

Concluding my remarks, I would like to note that if the capacity for UN peacekeeping is allowed to deteriorate, the options at the Security Council's disposal for the maintenance of peace and security will be severely curtailed:

- If UN peacekeeping operations are to continue to be one of the Organization's main instruments for the maintenance of international peace and security, United Nations civilian and military personnel must uphold the Organization's legitimacy and inspire confidence in their integrity by exemplifying the highest professional and ethical standards; and,
- If the moral authority of the United Nations is to be safeguarded, the Organization cannot stand silently by in the face of abusive practices, nor should it legitimate sphere-of-influence politics globally or regionally.

Thank you for your time this morning. Good luck to all of you in your future assignments.

Mr. Vladimir V. Grachev has been with the United Nations since 1993, originally serving as Senior Political Affairs Officer, DPKO/ELAD, and as a Desk Officer for UNMIH, UNSMIH, MICIVIH and MINUGUA. He assumed his present position, as Senior Officer (Political Affairs) in the Executive Office of the Secretary-General of the United Nations in March 1997. Prior to his service with the United Nations, Mr. Grachev had a distinguished career with the Foreign Ministry of the Union of Soviet Socialist Republics and later of Russia. From 1975 to 1981 he served in a variety of diplomatic assignments in New York City and Moscow. In 1981 he reported to the USSR's Embassy in Washington, serving as Second Secretary as well as Personal Assistant to the Ambassador and the Dean of the Diplomatic Corps. In 1986 he returned to the Foreign Ministry in Moscow as First Secretary, Head of the Analytical Wing, Secretariat of the Foreign Minister. Finally, from 1988 through 1993 he served the USSR (and later Russia) as Counselor for Political Affairs in the Embassy in New Delhi, India.

Mr. Grachev graduated from the State Institute for International Relations (MGIMO), Moscow, in 1975, receiving a M.A. (cum laude) in International

Relations. He was elected a Corresponding Member, International Information Academy, Moscow, Russia, in 1994, and in 1997 was elected as an Academician of that Academy. He has published an article entitled "Soviet-American Cooperation in the Search for the Nazi War Criminals."

Mr. Grachev is a native of Moscow, Russia, and was born in December 1952. He is fluent in English, German, Swedish and Russian, and is married with one son.

NAVAL LAW: Justice and Procedure in the Sea Services

by Lieutenant Commander Brent G. Filbert, JAGC, USN and
Lieutenant Commander Alan G. Kaufman, JAGC, USN
1997 Naval Institute Press

*Lieutenant Commander Peter A. Dutton, JAGC, USN**

As a text, *Naval Law, Justice and Procedure in the Sea Services*, starts out strong. In his forward, Chief Judge Cox of the United States Court of Appeals for the Armed Forces lays out the two pillars upon which the scales of military justice swing. "Military justice inculcates and reinforces discipline by consistently applying two fundamental principles: each person, regardless of rank, is responsible and accountable for his or her actions; and, each person, regardless of circumstances, is an individual entitled to be treated fairly, with dignity and respect." But from that lofty height, the text meanders down through the mechanics of military justice without significant discussion on the leadership context for making decisions about discipline. Additionally, the text fails to adequately address the convening authority concept or the limits of lawful influence the convening authority may bring to bear on the disciplinary process. To assess the fundamental importance of these concepts, consider the following cases.

In the late spring of 1991, YNSN Garrett and YNSA Kelly entered the mailroom at their NAS North Island command. Garrett watched as Kelly stole a credit card. With this and other stolen credit cards the pair treated themselves and their friends to restaurant meals, gasoline for their cars, hotel rooms, clothing and other goods. They smoked marijuana together and then later, when caught, lied to investigators about what they'd done. For his crimes, YNSA Kelly went to a General Court-Martial and was sentenced to a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances and reduction to pay grade E-1. For his crimes, Garrett was transferred early to a duty station near his parents and received non-judicial punishment amounting to restriction and extra duties for 30 days, forfeited \$880 in pay, and was reduced to E-2. Why the disparate treatment for similar conduct? Kelly was nothing more than an E-2 in the United States Navy. Garrett was the son of the Secretary of the Navy.

On Friday and Saturday, September 6 and 7, 1991, then-Chief of Naval Operations Admiral Frank B. Kelso, USN, attended the Tail Hook Symposium at the Hilton Hotel in Las Vegas, Nevada. On the 6th, Admiral Kelso visited with junior officers on the 3rd floor patio and toured squadron hospitality suites. During this tour through the suites, Admiral Kelso witnessed incidents of inappropriate decorum and behavior by Naval officers but took no action to stop them. Additionally, Admiral Kelso saw and heard a crowd chanting around a woman, urging her to expose her breasts and shortly thereafter, saw a bathing suit top being held up in the air. Again on Saturday, Admiral Kelso

visited the third floor patio at the Hilton and witnessed similar inappropriate behavior, including public nudity. Eventually, two Navy squadron commanders—CDRs Miller and Tritt—were charged with witnessing the same or similar conduct and failing to take action to stop it. Just over a month after the first allegations of misconduct at the Tail Hook Convention arose, several investigations were initiated. As part of the investigation, Admiral Kelso was interviewed twice and both times denied he had ever visited any of the squadron hospitality suites or that he ever witnessed any inappropriate behavior, or that he ever visited the 3rd floor patio on Saturday evening. During the investigation, which were closely monitored by Admiral Kelso and his staff, “flag files” regarding the personal involvement in the Tail Hook events by thirty three flag officers—including Admiral Kelso—were kept separate from the main investigation. Ultimately, CDRs Miller and Tritt faced criminal charges at a General Court Martial. Admiral Kelso, on the other hand, was promoted to Acting Secretary of the Navy and given an administrative Letter of Caution for his leadership failures.

What do these cases have in common? They involve the breakdown of the military justice system when the conduct of senior personnel—or those connected to senior personnel—is at issue. They point to privilege accorded to rank, and a disparate standard of justice, rather than to equal justice, fairly applied. These very real cases amplify the Achilles heel of the military justice system: that since a military commander has almost complete discretion in the handling of military justice issues, he or she must exercise personal moral courage in decision-making, even at personal expense, if a just result is to be reached. Only through such courage will the system flourish as the instrument of fairness and equality that Judge Cox lauds it as being.

Unfortunately, this fundamental problem in our justice system is lost in Filbert and Kaufman's text. They begin with a chapter that discusses the military commander's unique need for a disciplinary system that promotes good order and discipline and an effective fighting force. Fair enough. They acknowledge that a tension exists between justice and discipline. True. But *Naval Law, Justice and Procedure in the Sea Services* leaves the student, the future military leader, without a context for resolving this tension. A full understanding of a convening authority's power and the systemic limits placed on that power must be at the core of any course on military justice because it is fundamental to a mature understanding of discipline as an aspect of leadership. Indeed, part of the cause of the tension between justice and discipline is that equal treatment in reality is all too often a fallacy.

These are not simply abstract concepts beyond the ken of the average midshipman, nor an enlightenment that ought to be left to develop over the full course of a military career. If nothing else, the cases discussed above point out that all too often a full appreciation of the moral component in military justice decision-making simply does not develop on its own. Today's Midshipmen are not stupid. They are as goal-oriented and success driven as any generation. They too look to their senior officers for guidance on how to

Naval Law: Justice and Procedure in the Sea Services

succeed in the military. Do we really want our failures, spread across the front page of American newspapers, to be their moral compass?

Why not add a chapter on the powers of the convening authority that discusses both lawful and unlawful command influence over the military justice process? Use actual cases as studies in the limits of a convening authority's power and the unjust results reached when those powers are abused. Currently, the concept of unlawful command influence receives only the briefest mention, and the two or three pages dedicated to the concept of the convening authority are largely a rehash of the procedural requirements of the Rules for Courts-Martial. There is no critical analysis of the convening authority concept or discussion of why disciplined moral leadership is essential to effectiveness of military justice system. This is a significant omission in a book described by its authors as written to introduce future Naval leaders to the justice system that will one day be theirs.

Still, *Naval Law* has significant merits. It provides an excellent introduction to the punitive and non-punitive tools available to the military commander to enforce discipline. There is a liberal, perhaps even too liberal, use of case law to illustrate the various crimes and misdemeanors committed by sailors of all generations. And perhaps best of all are the two introductory chapters that discuss the history and development of military justice systems from the Roman military code to the Code of Military Justice.

Thus, as a text, *Naval Law* shows how the system is designed to work. Additionally, it clearly makes the case that the military commander needs a means to enforce good order and discipline in order to maintain an effective fighting force. But any course in military justice must at least begin to prepare tomorrow's leaders for the most difficult challenges, those of moral decision-making. Tomorrow's leadership will be better prepared if their education about the disciplinary powers they will one day be called upon to wield includes discussion of the moral decision-making skills required to reach Judge Cox's lofty goals. Only then will tomorrow's leaders have a full appreciation of their role in the creation of a system of discipline that is both actually fair and perceived to be so.

* *Lieutenant Commander Peter A. Dutton, JAGC, USN, is presently a student at the Naval War College, Newport, Rhode Island.*

BEYOND THE LAW OF THE SEA:**New Directions for U.S. Oceans Policy**

By George V. Galdorisi and Kevin R. Vienna

1997 Praeger Publishers

*Lieutenant Commander Robert B. Blazewick, JAGC, USN**

The intercepting fighter flew a close identification sortie past the U.S. Air Force C-135. Within seconds, shots rang out through the C-135's fuselage. The USAF aircraft continued on same course and speed. No fighter protection was coming. No fire was returned. The aircrew continued home angry and scared. The United States Government filed diplomatic protests with the government of Peru. Not Vietnam during the war; not during Desert Shield/Desert Storm. Not in Granada, Panama, or during any other actual conflict. This happened 80 miles off the coast of Peru on 5 August 1987, during peacetime. The issue was Peru's claimed territorial sea of 200 nautical miles. The United States disputed this claim and used the 1982 UN Convention on the Law of the Sea as her legal basis. As a result of the loss of the bi-polar Cold War pressures, over for almost a decade, actual and potential threats of this nature have been increasing. As the major maritime player on the world stage the United States not only needs a stable oceans policy but should be leading the charge and influencing its development. This is the thesis of Captain's Galdorisi and Vienna's book *Beyond the Law of the Sea: New Directions for U.S. Oceans Policy*.

Though the sub-title is somewhat misleading the authors deliver on their promise as stated in the "Forward" by Rear Admiral William L. Schachte, Jr., JAGC, USN (ret.), to be a "critical link in the continuum of scholarship on the law of the sea." *Beyond the Law of the Sea* is not only "descriptive," examining the historical process in depth found in no other single work on the law of the sea, but is "prescriptive," urging a comprehensive and systematic approach to a comprehensive U.S. oceans policy. The book is organized into three primary sections: the evolution of the law of the sea, an analysis of what the 1982 Convention prescribes, and the oceans policy issues facing the U.S. in the context of a now ratified treaty to which the U.S. is not currently a party.

The first section, the evolution of the law of the sea, is comprehensive and meticulously researched. This section is peppered with quotes from the United States' foremost experts on the law of the sea and is a fascinating read for anyone with any interest in its historical roots. As a graduate of the Naval War College and the former Program Manager for the Naval Justice School's Law of Military Operations Course I unreservedly feel this is the single most comprehensive work on the law of the sea in the context of the 1982 Convention in existence.

The prescription section is a concise summary of the law of the sea areas addressed by the 1982 Convention as they apply to, and have an effect on, the

Naval Law: Justice and Procedure in the Sea Services

United States. Taken together with the first section's comprehensive discussion of the United States' influence on the final form of the 1982 Convention, and the 1994 Agreement, rendering the portions of the 1982 Convention the U.S. had found objectionable (the Deep Seabed Mining Provisions) acceptable, these sections transition into the third. Captain's Galdorisi and Vienna discuss the issues regarding current and future oceans policy and prescribe a systematic and comprehensive method of dealing with them.

Beyond the Law of the Sea, though somewhat dry due its professional format and prose, is a must read for any student of the history and development of the law of the sea and the 1982 Convention and 1994 Agreement. Though at the time of this writing the Convention appears to be moving out of committee to the full Senate for signature, *Beyond the Law of Sea*, is relevant to the future of U.S. oceans policy and should be read by anyone with an interest in this vital subject.

* *Lieutenant Commander Robert B. Blazewick, JAGC, USN, presently serves as the Head of the Military Justice Department at the Naval Justice School.*

INFORMATION FOR AUTHORS

Authors are invited to discuss prospective articles or by writing to Editor, *Naval Law Review*, Naval Justice School, 360 Elliot Street, Newport, RI 02841-1523.

The editor, in conjunction with article editors, carefully reviews each manuscript for clarity, accuracy, and scholarly merit. The editor reserves the right to make editorial changes to a manuscript selected for publication. Manuscripts will not normally be altered in a manner inconsistent with the substance of the author's position. Where practical, the board will notify the author of any substantive changes before publication. There are no specific guidelines on manuscript length: brevity is not an obstacle to publication of a quality manuscript.

Manuscripts must be typed. The author should also submit a disk in WordPerfect or Microsoft Word compatible format. Authors should include an abstract of the proposed article, a short biography, and a statement as to whether the manuscript has been submitted elsewhere for publication. Per current directives, authors are solely responsible for security review. Authors may take a different position from that held by the government; when the author purports to state the views of the Department of the Navy or another governmental entity, however, security review is essential to ensure that the official position is stated accurately. No compensation can be paid for any articles published.

Articles should conform to the current edition of *A Uniform System of Citation* (16th ed.). Authors should consult the *United States Government Printing Office Style Manual* (rev. ed 1984), on matters not addressed in *A Uniform System of Citation* (the "Bluebook").

James R. Crisfield
Lieutenant Commander,
Judge Advocate General's
Corps, U.S. Navy
Editor